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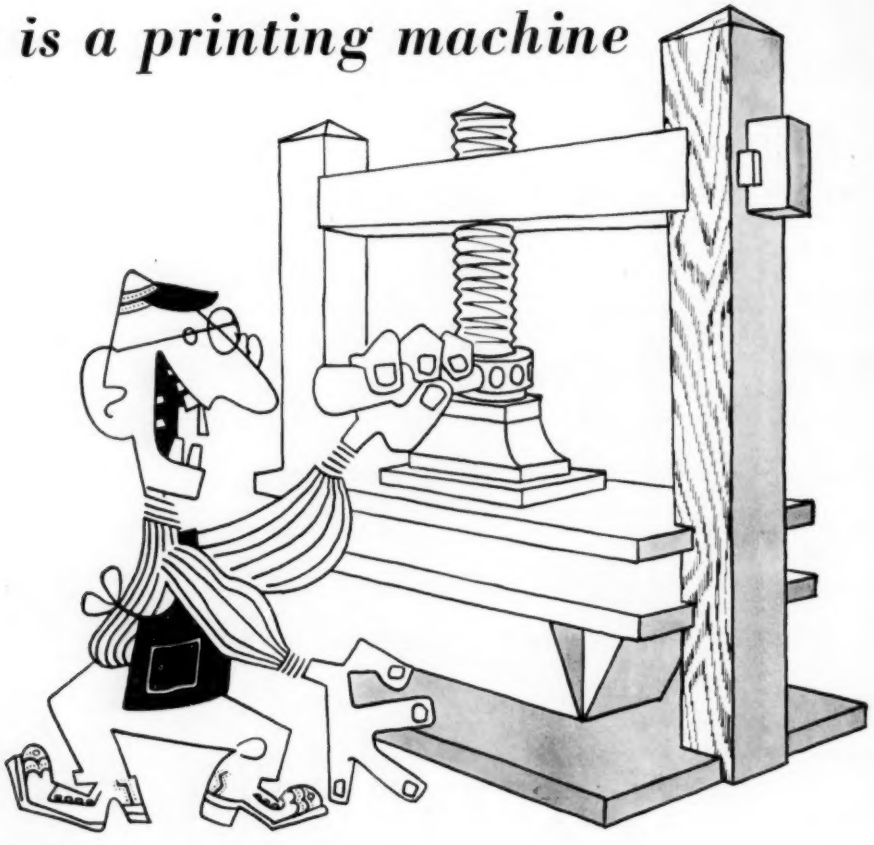

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MARCH, 1952

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are sixteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of thirty-six, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

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Dues are $12.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $3.00 per year, and for three years thereafter $6.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. The dues for all other Sections are $3.00 a year, with the exception of the Section of Taxation, which are $6.00 a year.

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CURRENT OUTLOOK

American
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Journal
★
March 1952

• The Widow's Mite—Before or After Taxes?

Illinois has just held that, in spite of the marital deduction, a widow's share on renunciation is to be determined after deduction of federal estate taxes as a "just debt" (*Northern Trust Company* v. *Wilson*, Case No. 45352,—Ill. App.—, 1st Dist.). Thus, the widow's share was diminished by federal estate taxes. The Illinois Supreme Court has denied leave to appeal.

Contrariwise, Ohio has just held that the widow's share is not to be diminished by these taxes. (*Miller* v. *Hammond*, —Ohio —, January 30, 1952). This Ohio Supreme Court decision makes renunciation exceedingly attractive to the widow. The Ohio rule could produce an instance where a widow, otherwise entitled to one-third, could receive more than half the entire distributable estate.

Probate lawyers in other states await local determination of the question.

• Will You Retire or Just Fade Away?

Since the House of Delegates approved in substance the Keogh and Reed bills, H. R. 4371 and H. R. 4373, respectively, the Committee on Retirement Benefits has worked steadily to increase the support of these bills. Interest is not by any means confined to lawyers. At a recent meeting to consider the bills there were represented associations for lawyers, doctors, dentists, accountants, farmers, architects, chemists, engineers, investment counsel, authors, underwriters and industrial designers, respectively. At this meeting an informal Steering Committee was created, of which George Roberts of the American Bar Association Committee was appointed chairman. The primary purpose is to arrange for a proper presentation of the case for the bills at any hearing before the Ways and Means Committee. Many minor amendments to the language of the bills have been suggested, some of which have unquestionable merit. It seems advisable to the Committee, however, to concentrate all efforts on obtaining approval of the concept of the proposed legislation and to avoid discussion of amendments until the matter is referred to the technical staff of the Ways and Means Committee. The need for remedial legislation to enable professional men to build even a modest fund for retirement is becoming more obvious with each new tax bill.

The considered and informed conclusions of the House of Delegates, past and current, on retirement benefits, on inclusion of lawyers in social security legislation, optionally or otherwise, on averaging income, on the reconcilability of these three proposals and on their legislative priority are all the product of years of study by many lawyers and the best men in these fields. They are supported by most other self-employed groups.

The sanctity of any individual's private opinion ought to yield to the view of the majority arrived at openly and in an orderly and representative manner.

How else but by faith in each other can common cause be made to achieve an equitable tax burden for all concerned?

• This Is *Your* Association

We are emphasizing the two coming Regional Meetings of the Association, as a part of our official and operative policy of bringing the Association's efforts on behalf of the members, the profession and the public within the easy reach and understanding of every lawyer and interesting him in our work.

Open invitations have now gone out in various ways to all lawyers in Kentucky, West Virginia, Ohio, Illinois, Indiana and Michigan to attend the Ohio Valley Regional Meeting at Louisville on April 9 through 12. All the bar associations of those six states are joining with the American Bar Association in this meeting. President John L. Davis of the integrated Kentucky State Bar Association has announced that his Association will have a full meeting jointly with the Regional Meeting. President Marshall Eldred of the host Louisville Bar Association has had committees hard at work for weeks. The program is designed to provide every lawyer there with the means of benefiting his clients substantially, while enjoying the hospitality and entertainment unique to Kentucky.

For example, our Insurance Law Section will sponsor a Trial Tactics Institute under the leadership of Clarence W. Heyl, of Peoria, which will rival the show that won acclaim at New York last September. Judge Bolitha J. Law's pretrial workshop demonstration alone will be worth the trip. There will be the American Bar Association's first exhibit of law books and every kind of law office furniture, labor saving equipment and decorations to be examined at leisure, under supervision of the Columbus, Ohio, Bar Associations staff.

Get acquainted with the national figures—great lawyers and judges—great Americans—who will be there! Enjoy springtime in the Bluegrass next month. Send your reservation request now to Edwards Quigley, Registrar, Court House, Louisville, Kentucky.

The benefit of the lawyer and his clients is, also, the theme of the Northwest Regional Meeting, June 17-20, at Yellowstone National Park. The bread and butter workshops, the *pro bono publico* programs and the speakers and instructors have been selected by the lawyers of Colorado, Idaho, Montana, Oregon, Utah and Wyoming, whose bar associations are participating. The Regional Director, William J. Jameson, Electric Building, Billings, Montana, promises a good program and a good time, but warns everyone to get their reservations from him early.

• Where can a bar association get enough money to do all it needs to do?

This is as common a question as comes to Headquarters. Of course, paying institutes, exhibits, classes of dues paying membership and the like are secondary sources of revenue, but dues are the chief source. Members dislike to pay higher dues unless they receive a *quid pro quo* in services of value to them as lawyers. Yet, the new services cannot be rendered until the dues are raised to provide the wherewithal.

There is a growing tendency for bar associations to be more businesslike in approaching this problem. For lack of money, they cannot provide additional attractive services.

Therefore, they prepare a sound plan and an attractive prospectus of what they want to do and what is needed, for careful presentation to the members. It may consist of only a simple specific proposal such as the employment of a bar executive, starting a bar office or initiating a particular program such as legal aid or a bar bulletin or journal.

Progressive associations are beginning to formulate specific public and professional long-range objectives with exact plans for carrying them out in annual phases and on feasible budgets through committees and sections with the idea that their members will contribute generously to definite undertakings for their benefit, directly or indirectly, so long as the projects are desirable enough.

Edward B. Love
Director of Activities
Editor-in-Charge

The Graduate Legal Clinic:

Restoring Lawyers' Research Responsibilities

by **Edward H. Levi** • Dean of the University of Chicago Law School

■ The question of what constitutes adequate preparation of lawyers for practice becomes increasingly important in an era when the complexity of the law is increasing with each passing year. Dean Levi writes of the usefulness of the legal aid clinic in teaching law students some of the practical aspects of the lawyer's work. He believes, however, that the usual legal aid clinic, limited to public defender work and legal aid for the indigent, is only a beginning. He suggests that the real function of the legal clinic should be to carry on research in the basic legal and social problems that lawyers must understand if they are to perform their true function in society.

■ Most of you know that the idea of the legal clinic is not only an old one but that it has been the subject of some considerable experimentation, much of it quite successful within the framework of its purposes as originally conceived. I should like today to suggest that changes both in the practice and the teaching of law require some modification in the original purposes of legal clinics in law education. And such a shift in purpose, in turn, requires some change in form. The origins of the movement rested in part upon a desire to preserve or recreate the values of the preceptorial system and to give students some direct practical experience. This desire was no doubt reinforced by the recognition that legal aid clinics would assist the state in the performance of its duty to see that lower-income citizens receive justice. These are valuable and sufficient justifications for legal clinics. If there were no other they would adequately persuade me. But I believe that in our times there is an even more urgent justification for a legal clinic of a little different kind. This justification lies in the opportunity to carry out legal research, which is a pressing need of the Bar and of legal education.

To develop this idea I want first to mention the early beginnings of the legal clinic experiments, at least enough to name some of them. Then, I should like to call your attention to some of the recent changes in the practice of law and its teaching which have a bearing upon legal clinics, both in the needs to be met and in the limitations which new conditions impose. Finally I should like to point up the importance to the Bar and to legal education of the kind of research which a legal clinic could make possible.

A long road has been traveled since the early beginnings in 1893 at Harvard, 1904 at Denver, 1908 at Northwestern and 1913 at Minnesota. Today many law schools have legal clinics. The clinics have adapted themselves to the service and educational opportunities which they have found. Some have followed the Northwestern pattern of a tie-up with a local legal aid group and with the work under some faculty supervision. At times students have been farmed out to private firms. Southern California and Duke have established clinics within the framework, architectural and otherwise, of the law school itself. Harvard has an unsupervised, yet court-privileged, student-run clinic; at Wisconsin students take part in court proceedings. Some of the clinics are active in criminal cases, and some also provide a briefing service for local practicing lawyers. A number of schools now require their students to engage in clinical work.

The movement has been well championed and supervised by Reginald Heber Smith and John Bradway. They have a collateral ally of considerable strength in Judge Jerome Frank, who has been the leading advocate for lawyer schools for the last twenty years. The course of the movement is well documented and the difficulties and values of various plans and procedures have all been thoroughly explored and explained.

Legal Clinic as Educational Device Must Be Re-evaluated

The legal clinic as a device for legal education must be re-evaluated in terms of the conditions of the modern practice of law and law school instruction. The legal clinic movement covers, roughly, the last thirty-five years of legal education. During that period both the practice of law

and the contents and methods of instruction have greatly changed. When Professor Morgan wrote in 1917 about the legal clinic at Minnesota, there were certain wartime aspects of administrative law, but it was not central to the average lawyer's practice. It was a theoretical subject in which Professor Freund of Chicago was still the pioneer. Perhaps the central issue in administrative law at that time was the constitutionality of compulsory workmen's compensation laws. The Sixteenth Amendment was only four years old. The Federal Trade Commission was just beginning to function. The Child Labor Act had been passed the year before and in a few years was to be held unconstitutional. There was a legal universe far different from the modern lawyer's world of labor law, trade regulations, administrative agencies and federal taxation.

The registration statement, the rearrangement of the business enterprise to substitute a capital gain for the distribution of income, the creation of a price structure to avoid an an illegal concert of action on the one hand, and a price discrimination on the other, or to take advantage of a doubtful Miller-Tydings Act—these can be at the heart of a modern practice. But they are only larger examples of the many changes that have come about in the day-to-day work of the lawyer. Much of the work of the present large house counsel office would be unnecessary if the clock were turned back to 1917. Many a modern lawyer has as his specialty a field that practically did not exist thirty years ago. The change has been more by way of addition than through substitution. The lawyer still must be the master of the traditional common law fields. Except in the field of procedure—and there are those who would doubt this exception—and in spite of the *Restatement*, the lawyer's work is not simplified. In fact during this period of change, there has been an increased demand on the lawyer for knowledge, craftsmanship and judgment, and this has been true for the common-law areas as well as for the newer public law.

Legal education has had to adapt itself to these changes. The modern law curriculum is likely to provide that from one-sixth to one-third of the student's time will be spent in the mastery of the newer fields. The law curriculum of 1920 has had to be squeezed, and squeezed hard, to make room for these newer subjects. Competition for a place in the program is greater than it has ever been. It becomes apparent that if undergraduate students are to learn all they *must* learn of what is *old*, and all they *should* learn of what is new, it is increasingly difficult to find very much time for field practice in the legal clinic.

Methods of instruction have also changed during the past thirty years. The case method has been ably adapted and adjusted to a changed practice. I hope I do not need to defend the continuing predominance of the case method in the teaching of the law. It is the greatest invention that has occurred in legal education. It provides a means whereby students can be made to participate in, and thus learn, the art of legal reasoning. It has given to law instruction a precision almost unique among the social sciences. It is still the predominant method of law teaching. But the case method as used today is a modification of the older Langdell case system.

Old Case Method Was Systematic But Sometimes Distorted the Law

In 1920, the case method was firmly established, and the usual procedure was to start with some seventeenth or eighteenth century case, dealing perhaps with a controversy between two fox hunters, and to trace the development of a legal doctrine through subsequent leading cases. The old casebooks show a fine sense of discrimination both as to the doctrines to be explored and the cases to be read. As Langdell stated in the introduction to his casebook on contracts, "the number of fundamental legal doctrines is much less than is commonly supposed". The number of important cases was likewise small. "The vast majority" of cases, Langdell said, "are useless and worse than useless for any purpose of systematic study." A part of the virtue of the old case method was that it was both systematic and historical. It was not always functional. It was directed at the growth of proper legal theory; it was not necessarily focused on the business or social transaction that might call for the application of apparently unrelated or sometimes contradictory legal theories. The elimination of wrong cases contributed to the development of legal theory, but it gave a somewhat distorted view of how the theories were actually used. This has been changed.

The greatest change is in the emphasis given to the typical transaction and to the functional problem. Modern casebooks are likely to be organized around the business or social transaction. Cases are selected just as much for the situations they typify as for their expressions of theory. The attempt is made to teach the law in action; to give to the student an awareness of the types of problems he will meet, and to teach legal theory as devices for handling these problems. The effort is made to emphasize the practical problem just as much as the historical theory; to stress the history and changes that have come about in the commercial and social institutions as much as the formulations of the theoretical legal sanctions. No doubt this was always somewhat true even of the older Langdell case system. But the functional approach, which began principally at Columbia and then spread to Yale, has caused a great change in emphasis. There is indeed reason to believe that at times the shift has been overdone.

Tutorial System at Chicago Aims at Realistic Teaching

The result of this change, in any event, is to give to law teaching a greater measure of reality—one of the hoped-for objectives of the legal clinic. Another purpose of the legal clinic, that of teaching legal craftsmanship has been sought in another way. Many law schools today have legal writing and drafting courses.

There has been sporadic interest in such training over the last fifty years, but considerable progress has been made in the last twelve years. This has occurred in many places; I am most familiar with the work at the University of Chicago.

In 1938 at Chicago, we brought in as teaching fellows recent honor graduates from our own and other law schools. We then began a tutorial system. Each first-year student was assigned to a teaching fellow. Under his supervision each student was required to write and rewrite legal memoranda and typical legal documents. The advantage of the system lies in the close personal attention which it makes possible; the training comes mostly from the requirement of rewriting. Each student has his mistakes pointed out to him and then is set to the task of trying to correct them. Sometimes the rewritten draft is gone over with equal care and the mistakes again pointed out, but now, at least for that assignment, it is too late to correct them—a kind of symbolic representation to the student that in law it is not always possible to have another chance. This type of training teaches the student how to use the library, how to do research and to put the results of that research into precise language. At times it has also been used to teach the student substantive law.

At Chicago, this training has now been carried into the second and third years as well. In the second year, the student is given one transaction to brief. He must also prepare the necessary documents. One year, the transaction involved the necessary papers to carry through a co-operative housing project. Last year the students were given a typical sales problem. The commercial venture cuts across the course lines embracing, for example for the housing project, partnership, corporations, real property, taxation and property bankruptcy. In preparing these problems we have had the close assistance of many members of the Bar. We can say with some confidence that the problems are actual, there is close supervision and the quality of the work required from the student is high.

In the third year the student has been required, in connection with the course in trade regulations, to write an industry study. The work is under the supervision of two economists on the law faculty who have been trained to work with lawyers in the preparation of antitrust cases. The preparation for these studies has required the student to use such references as Moody's or Poor's, trade journals and government publications, and to interview members of the industry. The work has implications which go beyond the trade regulations field into such areas as taxation and labor law.

Practicing Lawyers Are Brought into Law Schools

The Chicago program was originally made possible by a grant from the Carnegie Foundation. This type of program with many variations is now carried on in numerous law schools, such as Harvard, Northwestern, Stanford and California. And there have been other significant experiments. Probably in every law school much greater emphasis is placed on statutory law and the reading of statutes. Yale has developed a technique for the presentation by students of arbitration cases. Both Yale and Chicago in the past have made arrangements for their students to work in the summer in federal, state or local agencies. While I do not believe that these experiments have been too successful, because the supervision given is likely to be uncertain, these efforts do indicate that some such in-service training is possible. As a general matter the working relationships between most law schools and the Bar are closer than they have ever been before. Through informal seminars, lectures and conferences, the leaders of the Bar have been brought into the life of the law school. They have been brought in most successfully to discuss a transaction just closed or a case just handled in which they have participated and where the students have been given the necessary background. The limits of fruitful co-operation of this type have not been reached.

Moffett Studio

Edward H. Levi, Dean of the Law School, University of Chicago, was educated at that University and at Yale University. He was admitted to the Illinois Bar in 1936. He was Special Assistant to the Attorney General of the United States, 1940-1945; and First Assistant, Antitrust Division, 1944-1945.

There has been closer co-operation also with the judiciary. Law schools, in co-operation with local judges, are making an effort to see to it that students attend trials and appellate arguments before they graduate. The cases ought to be carefully selected for this purpose and the student acquainted with the problem ahead of time. In this connection it might be suggested that judges, with the consent of the parties, might have some cases actually tried in the law school building. This would give explicit recognition to the Anglo-American tradition, as exhibited in the Year Books, that judges and lawyers are also teachers.

All these things move in the same direction as the original legal clinic. In part, they accomplish some of the same objectives. They tend to support the validity of the original reasons for the legal clinic. The developments in law practice and in legal education do not settle the case for or against the legal clinic. They are, however, part of the necessary background against which the legal

clinic must be discussed. It is somewhat harder today to argue that, absent the legal clinic, the law student will not meet members of the local Bar, will have no experience in interviewing laymen, will not have his attention focused on the transaction rather than on the theory, will be unfamiliar with the statutory law, and will gain no training in legal writing, research or drafting. Such arguments have been made in the past for the legal clinic. But today, since the legal clinic has been part of a general movement to make legal education more realistic, the clinic has lost some of its unique status. Many of the values claimed for it are now in part provided by other methods and in some instances perhaps better than the legal clinic could provide them. At the same time it must be admitted that it is much more difficult today, because of the crowding into the curriculum of newer fields of law, to free the student for the concentrated amount of time which the legal clinic should require.

At Chicago this spring, legal clinic work has been provided for some of our students, under excellent supervision, at the Legal Aid Bureau. The students devoted one day a week for ten weeks to the legal aid program. Under such conditions they could do some interviewing and could brief some questions of law. They could not take part in the actual trial of cases, nor could they see through to completion the cases on which they did the interviewing. I think there is a real question as to how much this amount of time allocated to clinic work can be increased within the framework of the three-year program. I do not suggest there is one right answer for all law schools. Law schools differ in their advantages and opportunities and the allocation of time need not be stereotyped.

A legal clinic is important as a device to show students how cases are tried and to bring students under the necessity of finding, organizing and presenting facts in such a way that a case can be tried. In industrial centers such a case load certainly can be acquired. The purely service aspects of such a clinic are also important. There is greater recognition today than ever before of the need for such service. The general absence of a public defender for the federal courts points up that need. But viewing legal education as a whole I would stress in addition the clinic's research possibilities.

As one part of a legal research center a clinic of the kind I envisage could make a unique contribution to the law. It could not do all the kinds of research that are so badly in need of being done. Other parts of a research center would need to do other things. For example, we have no adequate comparative studies on wide areas of state administrative law—even at the proper level, let alone at the level of evaluation of effectiveness.

The matter has been well put by Chief Justice Arthur T. Vanderbilt who has said:

> . . . if your client were to ask you to give him all of the statute law of all the forty-eight states on a given point, you would be driven to get the expert opinion of a lawyer in every state but your own. If the client were to ask you for the administrative regulations and decisions on a given point throughout the Union, your task would be even more difficult for not every lawyer in each state could answer these questions. You would have to search out an expert in the particular branch of administrative law involved, because in most of the states administrative regulations and decisions are not even published. To be candid with ourselves, I wonder if we are justified in calling a system of law civilized where even the men who are trained to administer it cannot readily find the law without calling in experts to assist them. All of this suggests the need of a program of research in a Legal Center, which can be administered in connection with a law school, if we are to bring the education of future lawyers in line with the needs of the time.

The needs for this kind of study are apparent to any practitioner in terms of his own practice. They are apparent also as the basis for any kind of intelligent and orderly statutory revision program. The value of such work has been too abundantly proved to need documentation or support here.

But legal research has an importance over and beyond these direct and practical uses. You will remember Aristophanes' picture in *The Clouds* of the law school in ancient Athens in the dangerous times of the Peloponnesian War. The young men were being trained in the tricks of the trade to manipulate the law—all without the slightest relevance either to reality or to justice. Law is saved from this caricature because law is a learned profession.

Lawyers Must Understand Essentials of Our Institutions

Since law is a learned profession, we are under the necessity of understanding and explaining our own institutions, their history, growth and essential values. The lawyer must be the interpreter of his own times and something of a prophet as to the future. When change comes as a result of conflicting social pressures, it is very much the lawyer's job to see what has happened in historic perspective and to guide and regularize the change in such a way as to preserve the essential values of our own society. There is no such thing as teaching the law first and then understanding our basic institutions later. It is true, of course, that age and experience bring a deeper understanding of our institutions and their values. Age and experience will also bring a surer touch to the lawyer's craftsmanship. But the lawyer's technique is based upon his understanding of our basic institutions. The technique without understanding is only the caricature of the lawyer which laymen sometimes like to make. The way to understanding may be long, but the first day in the law school is not too soon to begin it. The law schools and the profession as a whole are linked together in the extraordinarily difficult task of understanding our own times.

But much teaching of law proceeds on the assumption that we are understanding our own times by supposing that in the last twenty years, only the *law* has changed; that what

(Continued on page 255)

The Outlook for the Lawyer Referral Service: Much Remains To Be Done

by **Theodore Voorhees** • of the Pennsylvania Bar (Philadelphia)

■ This is the first of two articles on the Association's current effort to secure the adoption of referral services by local bar associations. In it, the Chairman of the Standing Committee on Lawyer Referral Service reports on a survey of existing referral plans and appraises the accomplishment to date. A later article will discuss the future program of the Association as it was developed at the National Conference of Lawyer Referral Services held in Chicago on February 23.

■ At the 1951 Annual Meeting of the American Bar Association, the House of Delegates adopted a six-point, long-range program of which point number 2 was as follows:[1]

> The promotion and establishment within the legal profession of organized facilities for the furnishing of legal services to all citizens at a cost within their means.

The reasons for the promotion of lawyer referral services, which along with legal aid are the "organized facilities" in question, have been set forth in these pages a number of times.[2] We cannot claim the name and dignity of a profession if our services are not available to all who have need for them. Certainly justice cannot be said to be universal in this country when there exists a large portion of the population who have little access to a lawyer's professional advice and go through life either without being aware of the invasion of their legal rights or, if aware, without help from an attorney who would protect them. In the long run, there can be little doubt that if the Bar fails to provide a way whereby that group may secure advice for fees which they can afford, there is every likelihood that the Government will provide it. As Justice Jackson put it:[3]

> Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands.

People Who Need Legal Advice Fall into Three Groups

Let us look at the clients and prospective clients of the profession. First on the list are the corporations, partnerships and those individuals who are found in the higher income brackets. Generally speaking, this group has the wherewithal to look after itself and counsel are available and availed of when needed. Yet if an income of $20,000 is used as a cut-off, the individuals in the group are not numerous, for according to the most recent Treasury figures, only three hundred and seventy-six thousand people have taxable incomes in excess of that amount.[4] These constitute no more than one-quarter of one per cent of the nation's population.[5]

The poor, who unfortunately bulk considerably larger, have always been a special object of attention for lawyers, many of whom give them a considerable amount of advice for which they receive no remuneration. In addition, legal aid has gone a long way toward making its services generally available to the indigent, though Emery A. Brownell in his recent book, *Legal Aid in the United States*,[6] has concluded that with present facilities it is meeting only 55 per cent of the needs of its potential clientele. On the basis of a careful computation of the case loads of legal aid societies in various cities, it has been estimated that seventy-five among every ten thousand people in urban communities,[7] will require legal advice and not have the means to pay for it. Since, according to the 1950 census, there were approximately forty-four million inhabitants of the one hundred-odd cities of the country having a population of more

1. 37 *A.B.A.J.* 824; November, 1951.
2. Jackson, "Lawyer Reference Plans", 35 *A.B.A.J.* 979, December, 1949; Winters, "Bar Associations and Public Relations", 36 *A.B.A.J.* 734, September, 1950; Voorhees, "Publicizing the Lawyers' Reference Service", 37 *A.B.A.J.* 187, March, 1951.
3. 35 *A.B.A.J.* 979.
4. United States Treasury figures covering 1948 income tax returns.
5. If it is said that the $20,000 cut-off is at too high a level, the group may be enlarged to four-tenths of one per cent of the population by lowering the level to incomes above $15,000, and to eight-tenths of one per cent by lowering it to $10,000.
6. The Lawyers Co-operative Publishing Company, 1951.
7. *Legal Aid in the United States*, page 79; Reginald Heber Smith, *The Cost of Legal Aid in a Metropolitan Area* (1951).

than 100,000,[8] this means that the potential clientele of legal aid numbers 330,000 people which compares with its actual civil case load of 200,642.[9]

When we come to the intermediate group in the income range between $3,000[10] and $20,000, the statistics are thinner but some light may be cast by applying the same formula that has been used by legal aid. It should be noted that in urban communities one-fifth of the population is said to be eligible for legal aid[11] while four-fifths of the community are found in the middle group (those in the top income brackets being numerically negligible). Thus the legal aid formula really means that seventy-five out of every two thousand people whose economic status is such that they may avail themselves of its charitable service, will in fact require legal advice each year. The other eight thousand people in the ten thousand of the formula have incomes greater than the eligibility limitations for advice on a charitable basis. The application of the legal aid ratio to the middle group thus produces a total potential clientele among the forty-four million urban dwellers, that is four times the size of that of legal aid, or one million three hundred and twenty thousand clients per year.[12]

Now it is true that more "middle class" families than "working class" families recognize their need for legal assistance and consult lawyers[13]. Even so, Professor Koos' study and comparison of cross sections of the two groups demonstrated that in 40 per cent of the cases embraced in his study where "middle class" families were faced with a legal problem, a lawyer was not consulted. On this not-too-far-fetched basis, there would be 428,000 city people in the middle group who have legal problems each year and fail to obtain the services of a lawyer. In the words of Professor Koos:

> This means that two out of five families presumably having the means with which to engage a lawyer, failed to make use of the services the lawyer is equipped to give in situations such as these. What this means in terms of human worry, frustration and wastage can only be conjectured.

The point need not be labored. All lawyers are aware of the broad increase in the complexity of mere existence in this country during the last twenty-five years; few would assert that the number of our clients or the volume of legal business has shown a comparable increase. Sales of television sets and automobiles are not to be compared with legal services, but we may well ask ourselves why the manufacturers seem to be so far ahead of us in their understanding of the law of supply and demand. The activity of our committees on unauthorized practice and on public relations, the call of the National Lawyers Guild for governmentally-financed legal clinics, the British experiment in subsidized legal assistance, all point quite clearly to the fact that things are not as they should be, that the services of our profession for one reason or another are not measuring up to the need.

Medical Profession Indicates What Can Be Done

Before turning to the efforts of some of our bar associations to improve the situation, it is worth while to glance at the medical profession, which was shaken to its heels on September 2, 1948, by Oscar R. Ewing's report to the President on "The Nation's Health". It will be recalled that the burden of the report was that vast expenditures of public funds were necessary to insure adequate hospital and medical care of the country's expanding population. The medical profession strongly disagreed and assessed itself twenty-five dollars per doctor in order to combat Mr. Ewing's recommendations. The doctors are still apprehensive but they, at least, can give the following statistical reply to the advocate of the socialization of their profession.[14] The Blue Cross assures financial assistance to its forty million members if they need hospitalization and the Blue Shield to twenty million when they require surgery. Hospital care is now being provided for fifteen million people in this country annually, with six million having at least part of the bill paid by Blue Cross and three million by Blue Shield.[15] Furthermore, as Mr. Ewing himself pointed out in his report, physicians can take pride in the fact "that medical progress during the half-century has made it possible for every American child to expect 18 more years of life".

Now it may quickly be said that health and justice are incomparable, maternity and tonsilitis being perhaps more common than an inheritance or a complaint. On the political side, however, we may well ponder Reginald Heber Smith's statement: "Illness we can put up with; but injustice makes us want to pull things down."

Statistics Show What Referral Services Have Done

The bar associations of forty-five cities of 100,000 or more have adopted lawyer referral plans, several states have set up services on a statewide basis and a number of smaller communities have also adopted plans. The statistics set forth below are based upon the results of a survey made last year by William M. Wherry, then Chairman of the American Bar Association Committee on Lawyer Referral Services, and on some more recent reports which have come to the committee in the last few months.

The ten services which account for

8. Bulletin Almanac, 1952. The problem of supplying legal advice to persons of moderate means is not wholly an urban one but the referral plan is primarily adapted for operation in cities and towns.

9. *Legal Aid in the United States*, pages 170-172. This amount was the case load in 1948.

10. The upper limits for determining eligibility for legal aid varies in various communities from an income of $25.00 a week to $48.00 a week. *Legal Aid in the United States*, page 70.

11. *Legal Aid in the United States*, page 77.

12. It is believed that these figures are quite conservative. It is sometimes said that one hundred million Americans have no access to legal advice.

13. Earl Lomon Koos, *The Family and the Law* (Survey of the Legal Profession, 1948).

14. The statistics were supplied by the American Medical Association.

15. There are, of course, many factors which make the Blue Cross and the Lawyer Referral Service incomparable, the principal one being that all the patients of the medical profession are eligible for Blue Cross while the referral service does not refer clients who have been represented by a lawyer. Furthermore, the Blue Cross is in the nature of insurance while the bar plan deals with persons in need of immediate service.

Table I

Referral Service	*Annual Number of Applicants*	*Annual Referrals to Lawyers*
Chicago	12,000	2,445
New York	4,116	2,422
Los Angeles	1,800	1,543
Philadelphia	3,339	1,384
Boston (Estimated)	1,860	1,116
Detroit	1,223	1,068
Baltimore	781	781
San Francisco	751	751
Brooklyn (Estimated)	720	720
Minneapolis	600	600
	27,190	12,830

Table II

Referral Service	*Applicants per month*	*Referrals per month*
Akron	32	23
Allentown	7	3
Atlanta	68	39
Bridgeport	35	35
Bronx	4	3
Buffalo	10	10
Chattanooga	17	3
Cincinnati	42	25
Cleveland	45	28
Columbus	35	25
Dallas	56	56
Denver	10	8
Des Moines	40	40
Glendale	16	13
Grand Rapids	30	20
Louisville	15	10
Milwaukee	15	12
Oakland	60	60
Pittsburgh	16	16
Queens	120	23
Rochester	25	20
South Orange	5	5
St. Louis	62	28
Washington, D. C.	30	30
Wilmington (Del.)	7	7
	802	542

the large bulk of the referrals are shown in Table I, above.

Other services, many of which have been in operation but a short time, have reported their clientele on an average-monthly or most-recent-month basis as shown in Table II.

On the basis of the above somewhat fragmentary evidence, it appears that clients are applying to referral services at the rate of around 35,000 per year and that approximately 20,000 are being referred to attorneys. (The difference between the two numbers is accounted for by the fact that many of the applicants are disposed of by brief advice from the attorney who runs the service or are found to have no legal problem.)

The figures are not very impressive when compared with the 200,000 annual case load of legal aid and, of course, bear no comparison whatever with the huge totals of those who gain benefits from the medical services. Yet, it should be pointed out that about half the referral plans which have reported are not more than a year old and few have had more than three years' experience. Some of the larger cities which report five or ten referrals a month have obviously failed to build up adequate publicity and even in Chicago, New York, Los Angeles and Philadelphia, where the services are more firmly established, their potentialities are far from attained.[16] It would be a serious mistake to scoff, however, at a bar association which has served only a handful of clients. Who is to say that timely advice in any one case may not have meant fortune or happiness to that one client and thus have warranted all the effort which the association has made?

The relatively small number of clients in some of the cities is undoubtedly due to the fact that the bar association has made practically no effort beyond that which is called for in setting up a referral plan. It becomes increasingly clear, however, that much more is needed, particularly the securing of popular knowledge and understanding of what the association is trying to accomplish. The service must have broad, sustained publicity and unless the Bar is determined that it will get it, the benefit to the community is likely to be small.

All our professional pride and moral values call upon us with insistence that this effort be made. We cannot turn our backs on a clientele that is entitled to our help and advice. We cannot stand by and see these people of moderate means drawing their own wills, struggling with government regulations, attempting to disengage themselves from legal difficulties into which, if properly advised, they would never have strayed. The time has come to re-examine and revitalize the whole referral program.

16. Compare, for example, the number of cases handled in these four cities by Legal Aid in the year 1948: Chicago, 13,327; New York, 34,751 Los Angeles, 12,464; and Philadelphia, 14,070. *Legal Aid in the United States*, pages 14-15.

Economic Inventory of the Legal Profession:

Lawyers Can Take Lesson from Doctors

by Arch M. Cantrall • of the West Virginia Bar (Clarksburg)

■ Readers of the *Journal* will want to compare this article with that of Dean Levi of the University of Chicago Law School on graduate legal clinics, appearing at page 189. Mr. Levi is concerned with the lack of facilities for basic research in the problems of the law; Mr. Cantrall compares progress of the legal profession with that of the medical profession during the last twenty years and finds the lawyers lagging behind. He places the blame upon the lawyers themselves for their failure to provide the kind of professional service that their clients need.

■ This is the time of year for inventories, audits and annual statements. It is the time to see where you stand. That is true in business and in industry, and it should be no less true with lawyers.

I think we should take a few minutes to think about ourselves—where do we lawyers stand? Is our position improving? Are we standing still? Are we losing ground? What can we do about improving our position?

I was thinking along these lines, when there came to mind a remark of the wife of a young lawyer. The evening before this young wife had said that it would be wonderful if young lawyers could live as well as young doctors. And there came to mind other remarks about how much money doctors make.

In thinking about these remarks, I came to three questions:

Is it true that doctors make more money than lawyers?

If that is true, *why* is it true?

And, what can we do about it?

I do not like to measure the status of our profession in terms of money-making. Many lawyers will think that it is not a proper standard, that there should be some other basis of measurement, more in keeping with professional ideals. But I have not been able to find any such idealistic measuring rod and so I am forced to use the comparatives that are available. I prefer to face the problem with the tools at hand, rather than turn my back on the problem because I do not like the only tools available.

And, perhaps we should face a few facts before it is too late. These are inflationary times, and we and our families have to live and we have to keep our offices open. These basic necessities require increasingly larger sums each year.

Another important consideration is the future of our profession. We are proud to be members of the legal profession, one of the three learned professions that have been recognized for centuries. The clergy are concerned with the soul of man and the physicians with his body. We are concerned with his liberty, with his liberty under the law, to do, to own and to speak. We believe, and I think rightly, that our responsibilities, concerned with the rights and liberties of man, are important to the development of the highest type of civilization. In this belief, we are deeply concerned that able young men will continue to be attracted to the practice of law and that they will be adequately trained, so that there will continue to be lawyers of ability and character to protect the liberties of our children and grandchildren and the liberties of those who will come after them.

And so we are forced to be realistic. We must look to our economic status. Unless a young lawyer can live and raise a family on the income from his practice, he will have to turn to some other way of making a living.

With that background, let us turn to our economic inventory. How do we stand as compared with our brothers who practice medicine?

Lawyer's Income Suffers When Compared with Doctor's

The available information consists of studies of economic conditions in the legal profession made by William Weinfeld, of the National Income Division of the Office of Business Economics of the United

Table A

Average net incomes of all nonsalaried independent practitioners in the United States:

	1929	*1949*	*Percentage of Increase*
Physicians	$5,224	$11,744	125%
Lawyers	$5,534	$ 8,083	46%

Table B

Average net income increase in 1929-1949:

All civilian physicians in the United States	108%
All earners in the general population	109%

Table C

Year	*U. S. population*[a]	*Business population*[b]	*Lawyers*[c] *(excl. teachers)*	*Physicians*[d] *(incl. int. & res. excl. teachers & armed force personnel)*
Number	(thousands)			
1930	122,775	3062	161	154
1940	131,669	3383	180	165
1950	150,697	3980	200	190
Per cent change				
1930-40	+ 7.2%	+10.5%	+11.8%	+ 7.1%
1940-50	+14.5	+17.6	+11.1	+15.2
1930-50	+22.7	+30.0	+24.2	+23.4

a. Source: Bureau of the Census.

b. Source: 1930 and 1940: Churchill, Betty C., "Revised Estimates of the Business Population, 1929-48", *Survey of Current Business*, June, 1949, table 1, page 20. 1950: United States Department of Commerce, Office of Business Economics (unpublished data).

c. Source: 1930 and 1940: Bureau of the Census. 1950: American Bar Association-Martindale-Hubbell lawyer census total (unpublished estimate pending official census data).

d. Source: 1930 and 1940: Bureau of the Census. 1950: United States Department of Commerce, Office of Business Economics (unpublished estimate pending official census data).

Information in this Table compiled by William Weinfeld, of the Department of Commerce.

States Department of Commerce.[1] These studies cover the twenty-one-year period from 1929 to 1949. Mr. Weinfeld has made a similar study of the medical profession, covering the same period.[2] A comparison of these studies presents a picture that is far from being pleasing to a lawyer.

From these studies, I have selected a few representative figures. I am not a statistician, but I believe that these tables present a fairly accurate comparison of doctors' and lawyers' incomes.[3]

Table A is the bad news. In twenty-one years, from 1929 to 1949, doctors' incomes increased 125 per cent. Lawyers' incomes increased 46 per cent. In 1929 doctors and lawyers had roughly the same average incomes. In fact, the lawyers were slightly ahead. But in that twenty-one year period, the lawyers fell far behind.[4] In fact, it could hardly be claimed that the increase in lawyers' incomes has kept pace with the increasing cost of living.

It may be thought that the doctors' incomes are out of line. But that is not the answer. Table B shows that the incomes of all earners increased 109 per cent, while the incomes of all doctors increased 108 per cent.[5] The doctors are *not* out of line. They have kept up with the Joneses. The lawyers are the ones who are out of line. It may be urged that doctors' incomes are higher because they have raised the rates of their fees. That is not the answer. From the base period of 1935-39, the rates of fees of doctors had increased 38 per cent by 1949, while the cost of living increased 69 per cent, nearly twice as much.[6]

The difference is not due to a decrease in the number of physicians, in spite of the greatly publicized claim to the contrary. In the past two decades the number of physicians has increased 23.4 per cent while the general population has increased 22.7 per cent. See Table C.

The business world is a chief source of profitable law business. Table C also shows that the business population has been increasing faster than the supply of lawyers. It

1. "Income of Lawyers, 1929-48", *Survey of Current Business*, August, 1949; "Changes in the Incomes of Lawyers and Dentists, 1948-49", *Survey of Current Business*, July, 1950.

2. "Income of Physicians, 1929-49", *Survey of Current Business*, July, 1951.

3. The figures for physicians in Tables D, E and F are for 1949, while the figures for lawyers in those tables are for 1947. In each case they are the latest available. Only a partial study of lawyers' incomes was made for 1948 and 1949 and breakdowns for these tables are not available. The 1948-49 study indicates very little variation in those years from the 1947 figures used in these tables. Gross incomes of lawyers were higher in 1948 and 1949, but the increases seem to have been largely offset by increased expenses.

It must be emphasized that all these figures are averages (mean or arithmetic averages—not medians), and are subject to all the criticisms stated in Mr. Weinfeld's studies and in the A.M.A. survey. See footnotes 4 and 5, *infra*.

55,000 physicians returned questionnaires in the 1950 survey (forty-two per cent of those to whom questionnaires were sent), while only 3,353 lawyers responded in the 1948 survey (eighteen per cent of those who received questionnaires). A more thorough survey and study of lawyers' incomes might give different results.

4. *Median* income is defined as that income below (and above which) half of all the income recipients fall. In 1949, in terms of *median* net income of nonsalaried practitioners, dentists ($6,140) were a poor second behind physicians ($9,561), with lawyers ($5,787) trailing the dentists.

5. See "Income of Physicians, 1929-49", *supra*, note 2; and "Survey of Physicians' Incomes", by Frank G. Dickinson, Ph.D., and Charles E. Bradley, Ph.D., Bureau of Medical Economic Research, American Medical Association, Bulletin 84, 1951. The percentages of increase are not the same in Tables A and B, because Table A covers "all *nonsalaried, independent practitioners*", while Table B includes *all* civilian physicians, whether or not salaried, and whether or not independent.

6. According to the United States Bureau of Labor Statistics, fees of physicians were 38 per cent higher in 1949 than in the base period 1935-1939. This index of physicians' fees is part of the Consumers' Price Index (the cost of living index). The entire Index for 1949 was 69 per cent above the base period. Sources: See note 5.

would be expected that this increase in the business population would result in a corresponding increase in lawyers' incomes. That it has not raises the interesting question (to some extent discussed below) whether that failure is due to the inability of lawyers to render the services required by modern business.

Table D shows the effect of the size of the community. Except in the larger cities, doctors' incomes are almost twice lawyers' incomes.

And it makes no difference whether a man practices by himself or in a small firm. Table E shows that physicians make almost twice as much as lawyers where there are three or fewer nonsalaried practitioners in the same office. In larger offices the trend is reversed, but only 6.8 per cent of the lawyers in 1947 were in offices with more than three nonsalaried lawyers.

Lawyer's Income Does Not Match Doctor's Until Late in Life

How about age groups? Perhaps the young lawyer does starve for a while, but surely he earns more later. Table F demonstrates that not until the doctor begins to wear out physically, around age 60, does the lawyer begin to catch up. Most of the time, it is, again, two for one.

It does not look very good, does it? The doctors have kept up with the Joneses, and we lawyers have not.

Well, there is our economic inventory. Our brother profession has kept pace with the general trend of wage earners in this country. We have not. That not only hurts us, and our families, but it is going to keep a lot of fine young men out of the law in the future.

The second question is, *why is this true?* What have the doctors done, that we lawyers have not done?

Table D

Average net incomes for the whole United States by size of community of those whose major income came from independent practice:

Population	*Physicians*	*Lawyers*
Under 1,000	$ 7,109	$ 3,694
1,000 to 2,499	8,732	4,708
2,500 to 4,999	11,228	5,060
5,000 to 9,999	11,624	5,516
10,000 to 24,999	12,134	6,350
25,000 to 49,999	12,812	6,236
50,000 to 99,999	13,186	8,501
100,000 to 249,999	13,110	7,332
250,000 to 499,999	14,276	8,348
500,000 to 999,999	13,161	10,057
1,000,000 and over	10,661	10,625

Table E

Average net incomes for the whole United States for nonsalaried practitioners in the same office, *i.e.*, members of firms:

Members in the Firm	*Physicians*	*Lawyers*	*Per cent of lawyers in firms of each size*
1	$10,754	$ 5,759	73.6
2	16,697	8,030	14.8
3	20,055	12,821	4.9
4	18,193	16,614	2.1
5 or more	19,220	——	——
5 to 8	——	20,467	3.4
9 or more	——	27,246	1.3

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I do not pretend to offer any categorical answer. That would be absurd. I will offer a few facts from which the reader can draw his own conclusions.

Two young men start practicing. One is a doctor and one is a lawyer. The lawyer has had three years of law school, with fourteen or fifteen hours of instruction a week. The doctor has had four years in medical school, with a minimum of forty hours of instruction a week. The law school instructors are rarely active practitioners. Many medical instructors are active practitioners. Law school is concerned almost entirely with appellate decisions, the cemetery of errors.[7] The law student does

7. Compare Kurt F. Pantzer's division of the practice of law into legal planning (consultation and advice), negotiation, draftsmanship, advocacy, and appellate law, only the last of which (how to reverse on appeal a case that should have been won below) has been taught in the law schools, except for scattered and mostly recent efforts to teach some of the other divisions. These efforts are minor in comparison with the great importance of these other divisions in the actual practice. Further, what may be considered laboratory and clinical work is limited and elementary in the law schools as compared with such instruction in the schools of medicine, engineering, etc.

Table F

Average net incomes for the whole United States by age groups of those whose major income came from independent practice:

	Physicians	*Lawyers*
Under 30	$ 6,787	$3,176
30 - 34	9,806	5,170
35 - 39	12,608	6,786
40 - 44	14,476	7,684
45 - 49	14,967	8,904
50 - 54	13,952	9,872
55 - 59	13,226	8,765
60 - 64	9,896	8,295
65 and over	5,293	7,070

not study how to practice law correctly. He studies only what has happened when a case was not correctly handled in the trial court.

The study of medicine is not limited to the analysis of post-mortem reports, to see what mistakes were made by the attending physicians. The medical student is taught how to do it right in the first place. He watches the operations of eminent surgeons. He sees top-ranking physicians examine living patients. He learns to take a pulse. He listens to hearts and lungs. Most important of all, he does things not merely once, as a law class visits a courthouse, but literally hundreds and hundreds of times, until they are second nature. And at the same time he is being taught the theory of medicine. He learns to read X-rays, not by reading in a book about a patient dying because someone did not read an X-ray correctly, but by reading hundreds of X-rays under expert supervision.

Doctor Is Better Prepared Than Lawyer

When our medical student is graduated, he is much better qualified to practice than the law school graduate. But our doctor does not hang up his shingle when he graduates. He spends from one to nine years in a hospital as an intern, working up to be a resident. If he hopes to secure a board certificate as a specialist, he has to spend at least five years as an intern and resident.

Those years as intern and resident are devoted to organized instruction and supervised experience. He sees, and diagnoses, and treats and operates on, literally thousands of patients. As a consequence, when our young doctor hangs up his shingle, he is thoroughly trained, both in theory and in practice. He has not only read the books, but he has himself cared for thousands of patients. He *knows* how to practice medicine.

Can we say the same of our young lawyer, when he hangs up his shingle? Many patients go to the young doctor because they know he has been thoroughly trained in the complicated techniques of the newest developments. Do people prefer a young lawyer for complicated matters?

Well, there we have one possible answer to our question—doctors earn more than lawyers because they receive more thorough preadmission training and when they start to practice they are *in fact* competent to practice.

Doctors Have Better Postadmission Training

There is another possible answer, the highly organized and intensive postadmission training of doctors, as compared with the spasmodic and scanty postadmission training of lawyers.

Let us compare our state bar annual meeting programs with those of the doctors. I understand that the West Virginia State Medical Society annual meetings are representative. In 1951 that Society met for three days. The first day the general session met at 9 A.M., and five minutes later those in attendance were listening to the head of an important clinic in Wisconsin, lecturing on "Cysts and Tumors of the Neck". By the end of that day, they had had *eight more* one-hour talks, on orthopedics, water and electrolyte balance in patients, anesthesiology, clinical diagnosis of acid base imbalance, hyperthyroidism, fractures, congestive heart failure, and vaso constrictors in spinal anesthesia. That was one day.

The next day there were nine similar practical talks by specialists. And on the third day there were five more, making a total of twenty-four. Many of the speakers used lantern slides to illustrate diagnosis and treatment. The fourteen speakers, each an eminent specialist, came from New York, Louisiana, California, Maryland, Illinois, Massachusetts, Missouri, Wisconsin, Virginia and Connecticut. Over 600 doctors attended their annual meeting, out of less than 1800 physicians in West Virginia.

That was not an unusual program, but a typical average annual meeting of any state medical society.

Then there are the hospital staff meetings; the county societies with monthly programs; the regional societies, like the Southern Medical; and the American Medical, with its two big meetings a year, each with terrific educational programs. In addition, there are all the specialist organizations, the Colleges and Academies, each of which has extensive educational programs. Then there are the clinic programs, where a doctor goes for a day or two, or a week or two or three, on a special subject.

There we have two possible reasons for the differences in income:

First, when a doctor starts to practice, he is really competent.

Second, through his organizations he is continuously trained in the latest and best techniques.

But, you may say, look at all the new things in medicine. Look at all the new drugs. Law is always the same, we do not need all this help.

(Continued on page 260)

Charles Evans Hughes:

Publication of New Biography Is Major Event

by George Wharton Pepper • of the Pennsylvania Bar (Philadelphia)

■ The publication of Merlo J. Pusey's *Charles Evans Hughes* (New York: The Macmillan Company, 1951, $15.00, Two Volumes) is an event for all lawyers. One of the greatest advocates and judges in our own day, Chief Justice Hughes' career at the Bar, on the Bench of the nation's highest tribunal, and as a public servant and leader of his profession, exemplifies the finest traditions of the law. Another great contemporary lawyer, Senator Pepper, consented to review the biography for the *Journal* and his comments on it are printed here as a separate article because of the importance of the work and the eminence of its subject, who, in addition to serving his country as Secretary of State and Chief Justice, also served his profession as President of the American Bar Association in 1924-1925.

■ "I am going to the Gymnasium as soon as I have the money to pay in advance—$3. (for the year). I went once but was respectfully informed that they must have pay in advance. My shoes are in very poor condition —my hair also needs cutting and my term's reading-room tax ($1) should be promptly paid." So wrote the future Chief Justice to his father in 1879 as he was beginning his junior year at Brown. Less than forty years later his professional income at the New York Bar was estimated at $400,000. The need for shoes then no longer worried him and if he spent less on his barber than some of his friends could have wished, it was not because he lacked the wherewithal.

Mr. Pusey has compiled an illuminating account of the boyhood of "Charlie" Hughes. It is an evidence of the lad's sterling character and sound sense that he was not stung to madness by the ceaseless efforts of his father and mother to control every detail of his development. The father was a Baptist minister of very considerable ability. The mother was, if anything, the stronger character of the two. They both had deep religious convictions and a determination to implant them in their son. They had ample opportunity to work on him, for instead of going to school he studied at home. They destined him for the ministry but the lad tired of the routine services, was discouraged by observing his father's pastoral troubles and finally decided that the ministry was not for him. Somewhat against his parents' will he entered Hamilton (now Colgate) University, a freshman at 14. He thus gained a degree of freedom which Mr. Pusey styles "emancipation".

At Hamilton he spent two profitable years, making excellent headway in Greek, Latin, French, calculus and analytical geometry. At the end of his sophomore year, however, he developed an ambition to seek wider educational opportunities. He was fortunate enough to secure a scholarship at Brown University and, with the consent of his parents, matriculated there in the autumn of 1878. While he had reacted strongly against the regime which his parents sought to impose upon him, his affection for them had not diminished nor had the strength of his basic religious convictions. In later years he himself testified to the permanence of his early beliefs. This fact, and the loyalty with which his father supported him in his struggle for education, must be taken into account in any fair estimate of parental influence.

His three years at Brown passed quickly and he graduated in June of 1881. "Although he was the youngest in a class of 43 his intellect and capacity for work had made a deep impression upon professors and students alike." "While" comments Mr. Pusey "he had turned definitely away from the ministry, the moral essence of his home background had been transferred into his thinking and his new activities. The young man had found himself."

But he had not yet found his vocation. More and more he was inclining toward the law but before a decision could become a practicable possibility he must needs find a job. For some Brooklyn taxpayers, who

were seeking relief from overassessments, he made mathematical calculations for ten hours a day during six weeks at $6 a week. He then secured a teaching position at Delhi, New York, which yielded him $200 for the school year, with room and board thrown in. This enabled him to begin the study of law which he did in an excellent office at Delhi but he quickly decided that what he needed was systematic law school instruction. Having rejected an offer to remain at Delhi at an increased salary and another to join the faculty at Des Moines University, he entered the Columbia Law School, a step made possible by his father's continued backing. He sought and obtained summer desk-room in the busy office of Chamberlain, Carter and Hornblower and thus came in contact with a group of able and intelligent young law clerks who were employed by the firm.

When in the autumn the law school opened Hughes set to work with his usual enthusiasm and wisely supplemented the Dwight method of instruction by the independent study of case material. Upon graduation he was awarded a teaching fellowship and in June, 1884, was admitted to the Bar after an examination in which he attained a mark of 99½. The terms of the fellowship were such that he was free to accept the salaried position in the Chamberlain, Carter and Hornblower firm which two years before Mr. Carter had promised him. Thus gaining a chance to prove his worth, he was soon given a junior partnership in the firm and gradually enhanced his reputation for thorough work. Meanwhile he greatly enlarged his circle of friends.

Before long Hornblower withdrew to establish a partnership of his own and Carter, thus compelled to reorganize his firm, invited Hughes and Paul D. Cravath to join him in forming the firm of Carter, Hughes and Cravath. This they did and, at 25, Hughes thus became a leading member "of a highly respected firm with an extensive practice". He had met and been charmed by Carter's daughter, Antoinette, but until he became a partner in the firm he did not feel free to court "the boss's daughter". When he did, he found that she reciprocated his affection. On December 5, 1888, they were married and ever afterward set a perfect example of marital happiness.

Such, in outline, is the foundation upon which in later years Hughes reared so imposing a superstructure. His growth in intellectual stature and in professional reputation was matched by a gradual accession of physical strength. As a boy he had never been physically vigorous. As a young man he weighed not more than 140 pounds. By 1901 his weight had increased to 153 and by 1907 to 165. "When he attained 'a proper weight' of 173 pounds (stripped before breakfast) he was to hold it with little variation for more than twenty years."

His Political Career Begins in 1905

Physical vigor as well as intellectual acuteness was required for the proper discharge of responsibilities that soon came thick and fast. In 1905 he was chosen as counsel by the legislative committee appointed to investigate the "trust" which controlled the metropolitan supply of gas and electricity. The press hailed his selection with derision but as he proceeded to develop his case with methodical relentlessness derision was replaced by applause. All but one of the bills which the committee recommended were enacted into law and Hughes overnight became a national figure. It was logical that shortly thereafter he should be invited to be counsel for the Armstrong Committee named to investigate the life insurance scandals. He accepted on condition that he be given a free hand to conduct the investigation, which Mr. Pusey describes in one of the most interesting chapters in his book. "Through fifty-seven public hearings over a period of four months the exposé continued." The resulting enactments have been declared by competent authority to be "the best insurance legislation the world has ever known".

Next in sequence came the nomination of Hughes for the New York governorship—a nomination urged by President Theodore Roosevelt and made unanimously "by a convention in which he [Hughes] had no instructed delegates, no partisan politicians and only hostility on the part of the bosses. His only asset was the confidence of the people." It was this confidence which led to his election over Hearst by a comfortable plurality when all the other Republican candidates for state executive offices were defeated. In his chapter "Fighting Governor", Mr. Pusey describes in graphic fashion the steps by which Hughes at the very outset of his administration made political potentates understand that he and not they had been chosen Chief Executive of the Empire State.

Throughout the struggle with the representatives of the old order, Hughes kept insisting that his retainer came from the people and that he regarded their interests as paramount. In retrospect and at a much later date, John Lord O'Brian, one of his most loyal supporters, had this to say about the Governor's efforts: "It is impossible to reproduce for the present generation the aggressive personality, the seemingly inexhaustible energy, the unrelenting insistence of Governor Hughes." Mr. Pusey gives a graphic and, on the whole, fair account of this period in a series of chapters entitled respectively, "The Bosses Run Riot", "Retainer from the People", "Crusade for Democracy", "Man Behind the Whiskers" and "Fight with the Gamblers". The predictions of many experienced politicians were falsified when from these struggles the Governor emerged triumphant.

When in 1908 public interest was centered on the choice of a presidential successor to Theodore Roosevelt, Hughes was regarded by many as the man best qualified for the office. Popular preference appeared to be divided between Hughes and Taft. For Taft, Hughes had a sincere and openly expressed regard. When

the President used his decisive influence in behalf of Taft, the nomination of the latter was assured and was quickly accomplished by the Convention. A tender of the Vice Presidency to Hughes was politely but firmly refused.

Hughes campaigned effectively for Taft in the Middle West and was himself renominated for Governor by the Republican Convention which met in September. Following his speech of acceptance he made a whirlwind campaign and was elected over his Democratic opponent by a margin of about 70,000 votes. His second term was characterized, as the first had been, by a series of controversies with the Assembly. The most significant were those which concerned his advocacy of ballot reform and of the direct primary. But this time his fight was for him a losing fight—in spite of strong support from both Senator Root and Theodore Roosevelt.

President Taft Appoints Him to Supreme Court in 1910

It was in the midst of this struggle and after the Assembly had rejected the Governor's measures, that President Taft tendered Hughes the seat on the Supreme Court of the United States which had been vacated by Mr. Justice Brewer. "Albany was dumfounded by Hughes's acceptance. The bosses rejoiced and the Governor's political supporters put on sack-cloth and ashes", writes Mr. Pusey in chronicling the incident which in his opinion shattered the hopes of rescuing the Republican Party in New York from its "corrupt machine control".

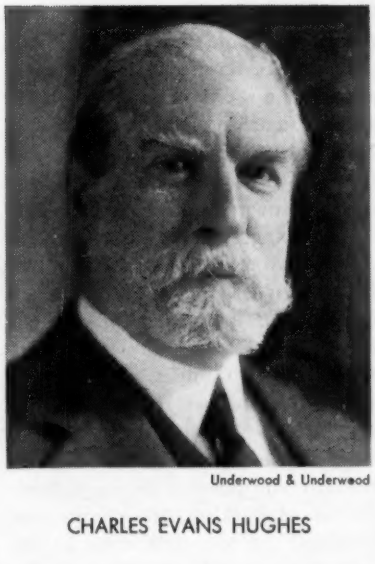
Following his resignation as Governor (three months before the expiration of his term) Hughes took his seat on the Supreme Bench on October 10, 1910. President Taft had been for some time undecided whom to name as Chief Justice in succession to Fuller. Should it be White or Hughes? He finally decided in favor of White. Mr. Pusey (page 281) indulges in an interesting speculation respecting the course that subsequent events would have taken had the younger man been named. Had Hughes become Chief Justice in 1910 he probably would not have resigned from the Bench to run for the Presidency in 1916 and therefore would not have had the opportunity, as Secretary of State, to arrest the Naval Armament race in 1922. Had he been Chief Justice from 1910 to 1930 "he would probably have led the court in more sweeping and successful adaptations of the law to our changing industrial civilization than either the White court or the Taft court achieved."

One of the most interesting parts of the book is Chapter 28 in which Mr. Pusey discusses the contributions to the work of the Court made severally by White, Holmes and Hughes. The three liked and admired one another and generally were in judicial agreement but Mr. Pusey seems to incline to the view that Hughes was, on the whole, the greatest of the three.

Hughes Refuses Presidential Nomination in Election of 1912

In 1912 Hughes definitely refused to be considered as Republican nominee for the Presidency and stated unequivocally that if nominated he would decline. He appeared to have retired permanently from political life and to have dedicated himself irrevocably to judicial service. In the chapter entitled "Wellspring of Federal Power", Mr. Pusey expresses the view that "Hughes' greatest contribution to judicial thinking in this period came in the adaptation of law to the control of economic policy." He insisted upon the plenary scope of the federal power over commerce and gained in judicial stature as the result of his opinion in the Minnesota Rate cases. Whether Hughes realized it or not, these and similar applications of the commerce clause appear to this reviewer to have gone far in the direction of undermining the "dual federalism" which Hughes nevertheless desired to preserve.

While he continued his judicial work with undiminished intensity the course of political events in 1916



Underwood & Underwood

CHARLES EVANS HUGHES

tended strongly in the direction of his nomination for the Presidency. It appeared that the schism in the Republican Party could be healed only by him. The Great War had precipitated questions of foreign policy which eclipsed for the time being all purely domestic questions. While in 1912 Hughes had expressed unequivocal opposition to the drafting of a Supreme Court Justice for the Presidency, it is only fair to say that the situation four years later might well be said to call for a reconsideration of this opinion. Short of such a refusal as he had given in 1912, he did what he could to prevent the question from presenting itself for decision. But the Republican Convention would not be denied. He was nominated on the third ballot and simultaneously resigned from the Court and accepted the nomination.

He threw himself into the campaign with every ounce of energy he possessed and Republican confidence was everywhere in evidence. The formal speech of acceptance was, however, on the whole disappointing. "It lacked the fire and bold strokes that had been associated with the name of Hughes in his governorship days." "If this is all he has to offer, some friendly critics asked, why did he leave the bench?" As the

campaign proceeded, Republican confidence waned—first because the general similarity of the aims of Wilson and Hughes on major policies seemed to be reducing the campaign to a discussion of secondary issues; and, second, because experienced political leaders became convinced that serious political blunders were being made by Chairman Willcox. The ill-feeling between the Roosevelt Progressives and the Old Guard was still in evidence and it became a decisive factor in the pivotal state of California. As the result of much misunderstanding and mismanagement (for which Hughes, personally, was not responsible) Hiram Johnson and his powerful supporters conceived themselves slighted and their interest in the presidential contest largely evaporated.

All the while it was becoming more and more evident to the well-informed that the involvement of the United States in World War I was inevitable yet "Wilson let his campaign run its course with increasing frenzy for peace". Mr. Pusey thinks that Hughes, lacking access to inside information, did not know that war was imminent. At all events he could make no effective answer to the disingenuous but highly popular slogan "He kept us out of war", which was the real strength of the Democratic campaign. By a margin of twenty-three electoral votes Wilson was elected. "California had denied him the 3,775 votes he needed to win, while Hiram Johnson on the same night (running for the Senate) was carrying California by nearly 300,000 votes."

After Defeat of 1916, Hughes Returns to Practice

After taking his defeat with good sportsmanship, Hughes began again the practice of law and also gave "an enormous amount of time to civic work". He organized the firm of Hughes, Rounds, Schurman and Dwight. From the outset the firm had at least as much legal business as the office could handle. The senior partner nevertheless found time to do much public speaking. In his chapter, "Champion of Liberty", Mr. Pusey comments upon these speeches and reports the notable cases in which Hughes appeared as counsel. In Chapter 37, "Fight Over the League of Nations", the author properly endorses Hughes' vigorous insistence that Article X of the Covenant was a trouble-breeder and commends four reservations which Hughes proposed to meet this and other difficulties. Wilson, however, obstinately insisted that the Covenant must be accepted without modification and thus made himself responsible for its final rejection by the Senate.

In 1920 Hughes was strongly urged to accept the nomination for the Presidency but he firmly refused to allow his name to be presented. The recent death of a well-beloved daughter and his recollections of 1916 combined to give finality to his refusal. After Harding's nomination and election the President-elect offered Hughes the post of Secretary of State, which he promptly accepted. Mr. Pusey gives a minimum of credit to Harding for his selection because (as this reviewer infers) the author has the Macaulay-like quality of damning with faint praise those whom he does not admire or with whom he does not agree. This regrettable characteristic manifests itself all through the book. Those who agree with the author and with Hughes are right. Those who disagree are perverse, unintelligent or corrupt. More just than his biographer, Hughes supported his Chief with unswerving loyalty and when the President died, delivered a memorial address which was a well-deserved but discriminating tribute.

He Receives "Free Hand" as Secretary of State

The Department of State was in chaos at the end of the Wilson regime. Hughes reorganized and revitalized it. In Chapter 39, Mr. Pusey gives a vivid description of the process; and in Chapter 41 records the admirable attitude of President Harding in giving a "free hand" to his Secretary of State in all that pertained to the work of his Department. In Chapters 42, 43 and 44, he gives illustrations of this policy as applied to the peace treaties, the mandated islands and the Washington Conference. The description of the Conference and of the enthusiasm that greeted Hughes' plan of naval disarmament accords with this reviewer's personal recollections of the occasion. Having actually witnessed this dramatic event and (six years later) the consummation in Paris of the Kellogg-Briand Pact and having in the interval observed the melancholy consequences of the Washington Conference as respects our own Navy, one finds it hard to justify in retrospect a settlement upon which at the time the hopes of the world were based. But Mr. Pusey rightly observes that retrospection cannot properly be a basis for appraising an international settlement. "The conference admirably met the demands of its own time." The simple fact is that great credit is due to Hughes for a carefully matured plan, dramatically timed and presented with unsurpassed impressiveness. The plan was a great gesture and, as such, it deserves the praise which Mr. Pusey accords it.

Following the Naval Disarmament Treaty came the Four Power Pact, the ratification of which Senator Lodge was largely instrumental in securing. The Pact in effect detached Great Britain from alliance with Japan and aligned her with American policy. "This", concludes Mr. Pusey, "is an achievement from which great historic consequences have flowed."

In a series of chapters, Mr. Pusey deals with international policies of almost equal significance. One was an attempt by Hughes to counteract the disastrous effect of Wilson's cooperation with Japan in 1918 which had included the sending of American troops to Siberia. While the reversal of Wilson's policy was of indirect advantage to Russia it did not involve condonation of Leninism or of Russian attempts to undermine the governments of the United States and of other civilized nations

of the Western world. Hughes was opposed to recognition of Russia unless accompanied by tangible evidences of good faith.

While Mr. Pusey does not specifically mention the fact, Senator Borah's resolution advising Russian recognition was by the Senate Committee on Foreign Relations referred to a subcommittee of which Borah was chairman and this reviewer was a member. Before that subcommitee Hughes appeared and presented such well-prepared and detailed evidences of Russian subversive activities in the United States as constituted an insuperable objection to diplomatic recognition. While the hearings were in progress Lenin's death was reported and Borah thereupon announced that further hearings were to be temporarily postponed. His resolution was then suffered to die a natural death. When in 1933 Franklin Roosevelt successfully advocated Soviet recognition it was upon the basis of explicit assurances of noninterference in the internal affairs of the United States—assurances which subsequent history has completely falsified.

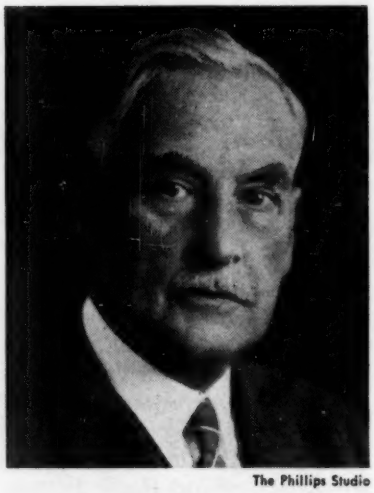
Another of Hughes' activities at this time was to counteract as far as possible the unhappy results of Wilson's handling of the international situation with Mexico and, generally, in the Carribean area. Hughes' aim was to substitute friendship for arrogance and hostility. He was unable to attend in person the Havana Conference of 1923, but Mr. Pusey, in Chapter 53, departs from chronological sequence and gives an interesting account of Hughes' invaluable services to the cause of Latin-American friendship rendered at the request of President Coolidge at the Conference of 1928 after Hughes had once more become a private citizen.

Chapter 34 chronicles Harding's tragic death, the succession of Coolidge and the development of an understanding friendship between him and Hughes. Chapters 55 and 56 deal, respectively, with "Economic Policies" and "The Struggle for Post-War Recovery". In the former there is an accurate account of the negotiating and signing of the Treaty of January 23, 1924, dealing with the off-shore search and seizure of vessels of British registry carrying contraband cargoes of liquor. This reviewer later had an opportunity to observe the practical operation of this convention when representing the United States in the *I'm Alone* controversy with Canada. In the chapter on post-war recovery there is an interesting account of the pilgrimage to London made in 1924 by the American Bar Association of which Hughes had become President.

The chapter on the World Court is reminiscent of a controversy in which neither side could see any merit in the position of the other. Mr. Pusey, with characteristic partisanship, does more than justice to one side of the issue and much less than justice to the other. Two facts, in the opinion of this reviewer, will some day be generally recognized as self-evident. One is that a court which is the organ of an international political organization can never command greater public confidence than does the organization of which it is an appendix. On the other hand an independent judicial establishment, divorced from political entanglements, will have a maximum chance of satisfying the well-nigh universal demand for a tribunal of international justice. The second fact is that the advisory opinion, in the case of an international tribunal, is quite as likely to be a "trouble-breeder" as was Article X of the defunct League of Nations.

Appointment to World Court Follows Retirement as Secretary of State

In 1925 Hughes resigned, having earned for himself a place in the front rank of great Secretaries of State. His return to the Bar was a welcome experience, "Rejoining his old firm—he had everything to his own liking, including his complete independence." He was welcomed with acclaim and accepted many invitations to make speeches. In spite of these and other such pre-



The Phillips Studio

GEORGE WHARTON PEPPER

occupations he became again a leader of the Bar—but only in time once more to leave it. This time it was to serve as a judge of the World Court. He enjoyed life at The Hague and added lustre to a tribunal which had never attained the degree of usefulness which its promoters had contemplated for it. But before the end of the two-year term for which he had been elected he resigned from that Court to accept from President Hoover an appointment to be Chief Justice of the United States. A determined effort was made in the Senate to reject the nomination. Norris led the attack on Hughes, supported by Glass, Borah, Blease, Dill and others; but after a venomous debate the Senate consented to the appointment by a vote of 52 to 26. Nation-wide approval quickly followed and those who had opposed confirmation were generally condemned.

The attempt has been made in this review to encourage the readers of the JOURNAL to study for themselves the sixty-three chapters which the reviewer has here condensed. The nine later chapters which describe in detail the judicial work of the Chief Justice cannot with advantage be so treated. The captions themselves are a sufficient inducement to read them: "Inside the

(Continued on page 262)

Ethical Problems of Counsel for Big Business:

The Burden of Resolving Conflicting Interests

by Glen McDaniel • of the New York Bar

■ No matter how honorable and capable a lawyer may be, there are times when he is faced with a problem of ethics that would test the wisdom of Solomon. Mr. McDaniel discusses some of these situations that arise for the counsel of large corporations who owes a duty to the corporation, to its management, to its majority and minority shareholders and perhaps to the other corporations or individuals whose interests have come into conflict.

■ Public interest in the ethics of the lawyer for government and the people he advises has today reached such proportions that it threatens to achieve the status of a political issue. The lawyer who enters government service learns that an ethical standard has been created for him. Disguised under laws popularly referred to as "conflict of interest statutes", a code of conduct established by Congress tells him, in none too clear terms, that there are some things he is not allowed to do. These prohibitions relate to the kind of work he may undertake, the timing of it and in some cases the compensation for it.

His colleague who represents the commercial corporation has no statutory ethical standard to guide him. It cannot be predicted that the ethics of the corporation lawyer will achieve the stature of a political issue; nevertheless, the ethical problems facing a lawyer representing a big corporation are quite real. It is the purpose of this article to point up a few of these problems, evaluate their significance and perhaps indicate some desirable solutions.

The Dimensions of the Problem: Ethics in Big and Small Businesses

For the present purpose the term "big business" is used to mean a large corporation whose stock is traded on the exchanges and is widely held; which has diversified products or services; whose product lines are decentrally managed; and which operates nationally or at least regionally.

It is clear that the ethical problems of counsel for big business are less substantial than those of counsel for small businesses. This is so for a number of reasons.

The typical big business client is a professional corporation manager to whom the greatest catastrophe is the impairment of his reputation in the community and who rightly feels that his fiduciary duty to stockholders does not require that he transgress legal rules or ethical principles. He is typically not a man of wealth. He usually has started from humble beginnings and by hard work and good luck has brought himself to a position of responsibility and power. The great driving force which impels him is not the accumulation of wealth. He seeks "success" which means, to him, a position of respect before the public and a satisfaction that the institution he heads is being managed not only so that it is profitable this year and next, but that it is sound for the long pull and will be a stronger and better organization when it is turned over to his successor. Adverse publicity and scandal are anathema to him.

Because of the size and diversification of the big corporation, no particular problem is likely to be crucial to its life. There is therefore less temptation to rationalize unethical conduct on the basis that the desired course of conduct is a matter of life and death. Losses can be written off without deterring the enterprise from its main path. One division or subsidiary may even reap an indirect benefit from the misfortune of another. This is to be contrasted with the situation of the small proprietor. There, problems arise where literally everything is at stake, where the welfare of the owner and his family are enveloped, where the education of his children and the security of his old age are threatened. There is no doubt that in such circumstances the temptation to let the end justify the means is intensified.

Unethical conduct is more risky for the big business manager than

it is for the small business man. One reason for this is that unsavory facts cannot be covered up and secreted in a large organization. Adequate files must be maintained. The very taking of action itself requires the collaboration of many individuals. The point was well put by counsel for a large corporation which recently was charged with having falsified certain records. Said the lawyer:

> It is perfectly apparent...that a corporation such as ours, which is a big business, can't be clever. We can't be snide. We can't be deceitful. A big corporation such as ours can't do business that way. We have to be above board and we are above board.

A second reason is that government is constantly conducting detailed investigations of the affairs of large corporations. This happens not only because the importance and magnitude of the activities of large corporations have a more concentrated bearing on the public interest than the affairs of small companies, but also because it is politically advantageous to attack big corporations.

Public Requires Higher Standard of Big Business

It is clear that the public requires a higher standard of conduct of big business than it does of small and medium-sized business. There is truly a double standard of conduct in American industrial life today. One striking example is that large corporations could not possibly entertain the expectation of retaining as high a rate of profit from war contracts during World War II as did many small and medium-sized businesses. The same will undoubtedly be true in the present rearmament period. A big corporation is constantly ordering its affairs with an eye to defending itself before the bar of public opinion.

An example from my own experience during World War II illustrates this point. On one occasion during the war I was simultaneously negotiating for the government two large contracts for war materials. One was with one of the largest industrial corporations in America. The other was with a company that was essentially a small business organization dominated by one man, dependent upon government business and expanded by government to a volume of activity far beyond its resources. The head of the smaller company knew that a mistake of judgment on his part could wipe him out. After the contract price had been agreed upon for both contracts and in the completion of negotiations on the contract terms for the smaller one, the president of the company ascribed great importance to a new type of clause that resulted in saving money otherwise payable by the company for local taxes. The clause was inserted in his contract. When we then came to the final stages of negotiating the larger contract, I thought it only fair to offer this tax-saving clause to the larger company. I explained to the vice president and general counsel that the clause had been approved and would result in substantial savings. With apparently no reflection on the matter, he declined the offer, saying that it was the policy of his company to pay its full share of the local taxes wherever its plants might be located and his company would not desire to use any contractual device which might give ground for criticism that his company was not paying its fair share of taxes. This state of mind is not untypical of the management of large corporations.

The professional manager of big business wants to meet a higher standard of ethical conduct because it is one of the trappings of success. If the manager can make his corporation so sound and strong that it can give heed to higher public interest considerations and rise above mere commercialism, he will achieve the kind of leadership and "success" that it is his life's ambition to attain. In other words, the big business manager is expected by the public to measure up to, and he himself has a great incentive to achieve, a type of conduct that is of a higher order than merely ethical.

All these considerations make the path easier for big business counsel, but inherent in this particular field of practice are certain problem situations that are troublesome, or even vexing.

Management, Stockholders' Conflicting Interests Raise Ethical Problems

In small business the manager is either the proprietor or is completely dominated by the proprietor. In the big corporation, however, ownership and control have practically separated. As Berle and Means have stated so well, the control has moved centripetally and has been centralized more and more in the hands of management, while ownership has moved centrifugally and has become widely scattered among thousands of stockholders across the nation. Management stands in a position of fiduciary responsibility to stockholders. But, until trouble arises, control is actually in the hands of management.

To point up how this situation can create ethical problems for the lawyer, the very personal relationships that are involved must be emphasized. The lawyer's relationship with the top manager is apt to be a close one. For example, quite early in the lawyer's career, his old high-school classmate may have become his client and after many eventful years, the classmate becomes the head of a great corporation. Throughout the years, the lawyer may have come to his friend's aid on many matters very close to their hearts. The lawyer will have helped him when his son got into trouble or when his little daughter was struck by an automobile. He will have spent much time with him in his home and on fishing trips. The old classmate is the lawyer's client. Actually, however, he acted in his capacity as a corporation president when he retained the lawyer as counsel for the corporation. At that point the lawyer assumed obligations to the corporation and to its stockholders.

Suppose a stockholder's suit were commenced charging the president and the management group with fraudulent mismanagement in conducting the affairs of the corpora-

tion. Before the lawyer has had time to move or answer, opposing counsel calls him and explains that the plaintiff is a poor man, that he owns 500 shares of stock quoted on the market at $5,000, but that actually the plaintiff feels that had it not been for the mismanagement of the defendants the stock would be worth $15,000. Counsel says that the plaintiff is only trying to realize the actual value of his stock and that if his stock could be purchased for $15,000 he would drop the suit. When the lawyer reports this to his friend, the president observes that obviously it will cost much more than $15,000 to defend the suit, and that this offer only shows that the suit is brought to harass the management into a settlement. He authorizes the lawyer to settle for the $15,000.

It is certainly to the best interest of the good friend and client, the president, to settle the case and avoid the damage to reputation which a trial of the case would involve. But is it in the best interest of the stockholders? Is it possible that there may be some merit to the allegations of the complaint? The lawyer does not think so, but he does not know all the facts. In such a situation, because of the close personal relationship between the lawyer and client, and because of the opposing counsel's conduct which tends to indicate that the suit was brought for the purpose of extorting a settlement, any normal human being could feel tempted to take the easy way out.

Another example of conflict of interest between management and stockholders can arise in the field of management compensation. A committee of the directors of a corporation explains to its lawyer that the board wishes to give a retirement contract to his friend, the president. They ask the lawyer to perform the necessary legal work to carry out the plan. It is a very liberal contract. It goes into effect whenever the president himself decides he would like to retire and it provides for payments to his wife even after his death. All the members of the board and the management enthusiastically support the idea of such a contract. It is unthinkable to any of them to suggest that the amount referred to in the contract is more than the great man is fairly entitled to. They look upon him as indispensable. All these people give a great deal of legal business to the lawyer and to his firm every year. There is a tendency to forget the interest of the stockholders, whose money is being used for this purpose. If the lawyer questions the propriety of the contract he will do so alone.

A third example lies in the general field of the pre-emption of corporate opportunities. Assume a corporation to be a great mining and smelting organization. The lawyer's friend, the president, calls him in and says that he and other members of the management have been importuned for some time by an old acquaintance who thinks he has located a deposit of low grade ore containing uranium, has it under option and wants to develop it. The president says that the matter is a very risky and uncertain one and he feels he would not be justified in putting the stockholders' money into this enterprise. He is willing, however, to contribute some funds of his own to this venture and other members of management have indicated a similar willingness. He asks the lawyer to form a corporation which would exercise the option and attempt to process the ore. The lawyer should not rest upon the president's statement as to the exercise of his business judgment on the question of whether the stockholders' money should be risked on such an enterprise. Temptation to do so, however, is great because it is difficult for the lawyer to challenge the client's conclusion upon a matter which appears to be so clearly a question of weighing business risk and exercising business judgment.

Independent Opinion Is Often Useful

Problems of these types are a source of frequent concern to lawyers practicing for large corporations. There is no easy answer to the lawyer's problem. One device that is frequently used is the procuring of an independent expert appraisal or opinion. I know of one case, for instance, of a stockholders' derivative action against members of management where the firm which was general counsel for the corporation recommended that a committee of the nonmanagement directors be formed to investigate the charges and that the committee retain independent counsel for the purpose. The only collaboration between the general counsel's firm and the specially retained firm was the giving of information and files. The special counsel, after thorough investigation extending over months, rendered an opinion, which was accepted by the committee of the Board, to the effect that the charges were without foundation. When the committee's report was forwarded to the attorney for the plaintiff, the suit was withdrawn. This example is unusual insofar as the withdrawal of the suit is concerned, but the device is a useful

Moss Photo

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one when a lawyer is faced with a conflict of interest problem.

There are certain collateral aspects of conflict of interest between management and stockholders which bear mention. One is that the lawyer must continually guard against the perpetration of any injustice to the manager by the corporation or its stockholders. Such cases seem to arise especially in the field of pre-emption of corporate opportunities. In the case of the uranium deposit, it is easy for directors and stockholders to sit back for years while the president's speculative venture wrestles with the pioneering problems of uranium development. If the venture is a loss, the loss falls entirely upon the individual investors. If it is a great commercial success, the nonparticipating directors or stockholders, through a derivative action, demand that the property be turned over to the corporation because a corporation opportunity has been pre-empted. There is a flavor of entrapment in some of these cases.

The other collateral point is that in dealing with such problems the lawyer must not allow himself to fall into the error of thinking that the stockholders at large necessarily have the same interests as a particularly aggressive minority stockholder. Such a minority stockholder can be motivated by much more selfish impulses than management itself. The situation may be, and often is, that the aggressive minority stockholder is merely a rival professional manager maneuvering to obtain control for himself.

Interests of Majority and Minority May Be in Conflict

Conflict of interest between entities in the same corporate structure can involve the conflict between management and stockholders as well as conflicts between majority and minority stockholders. The problem is aggravated by the fact that in the typical case the clients, the directors and officers of the parent corporation, will also be directors and officers of a subsidiary or an affiliated corporation which has a conflicting interest. This may be illustrated by two conventional examples.

A lawyer is a director and general counsel of a large oil company, Company *A*. A smaller oil company, Company *B*, which is a competitor of his client, enters into certain contractual relations with Company *A* and ultimately Company *A* acquires stock control of Company *B*, puts a majority, including the lawyer, on the Board of Directors of Company *B*, and makes a contract obligating the parent to establish Company *B* in a new branch of the petroleum business. Subsequently, the lawyer has to decide as counsel whether the subsidiary can legally enter this new line of business. It may be a close question under Texas law. The lawyer has been placed in a situation where he has a large personal stake in the parent company but not in its subsidiary. His close associates sit with him on the board of the subsidiary while he is engaged in an acrimonious dispute with the minority directors of the board. It would be of great advantage to his regular client and, incidentally, to his close associates if he were to arrive at the opinion that it is illegal for the subsidiary to enter the business. Great compulsions unconsciously work upon him in his rational formulation of views on the delicate legal factors involved. There is no doubt that in this situation the perplexed lawyer has a professional obligation to the minority stockholders and board members of the subsidiary.

The lawyer may decide that under the circumstances he should not rest entirely on his own judgment. If he decides to retain outside counsel who practice in the locality involved, he may then have to weigh realistically the merits of their opinion without taking refuge behind it. He has the additional problem of deciding whether he would be justified in relying upon one outside opinion. He may get an outside opinion from Texas counsel which is to the effect that it is unlawful for the subsidiary to enter the business. Would a lawyer honestly think that he has discharged his duty if he were to accept this one opinion from local counsel?

He may decide that it is not enough to rely upon the one opinion and he obtains another from New York counsel. The second opinion is to the effect that it is lawful for the subsidiary to enter the business. The dutiful lawyer may then have to decide whether to act in disregard of both opinions and decide the question *de novo* himself, or perhaps to get further opinions and make it the best two out of three or three out of five. Whatever course the lawyer determines to pursue, a serious question may be raised as to the proper discharge of his duty.

Another example illustrates the problem. The client is this time president of a large railroad and president of a subsidiary which operates a motor freight system. A tugboat company owns 30 per cent of the stock of the subsidiary and has directors on the board. The directors of the parent company are convinced that the operations of the subsidiary will continue to be a drain upon the resources of the railroad and they want to sell the property of the subsidiary to a rival motor freight line which desires to buy. They know that the minority directors of the subsidiary will implacably oppose the sale and will urge that the railroad should continue to lend financial support to the subsidiary in the expectation that it ultimately will be profitable.

In the nature of things, no one possibly can know which group is right on the question of business judgment. The client, however, is convinced that his main duty is to the parent corporation and this duty is best discharged by terminating the financial drain on it. He knows that if he works in the open to bring about the merger, the minority directors of the subsidiary will endeavor to block him by appeals to court or administrative agencies. He wants to conceal the fact of the merger negotiations from the minority interests. He wants the lawyer to participate with him in a somewhat clandestine series of negotiations to try to arrive at a merger agreement with the rival freight line, after which the

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Legality of Corporate Support to Education: A Survey of Current Developments

by Miguel A. de Capriles and Ray Garrett, Jr.

■ The soothsayer's admonition to Caesar, "Beware the Ides of March", is appropriate for all of us as Americans face their annual headache of filing their income tax returns by the fifteenth of this month. The tax burden weighs heavily upon the individual and the large corporation alike. Individuals and corporations alike would gladly find ways, if they could, of decreasing their taxes. In recent years, individuals and corporations have been increasing their contributions to charity as a means of lessening the amount that otherwise would go for taxes—this is, of course, entirely proper and the deduction for charitable contributions written into the Internal Revenue Code is recognition by the Government itself of the value of such contributions to society. But the corporation that would like to give some of the excess in its treasury to a worthy charity instead of to the Government is faced with a problem which does not concern an individual taxpayer. Under the old common-law rule, corporate directors have no right to "give away their shareholders' money". Mr. de Capriles and Mr. Garrett argue in this article that the common-law rule is rapidly disappearing in the face of modern conditions and economy. Readers of the *Journal* may want to consider this article along with that by Laird Bell, of Chicago, in the February issue at page 119.

■ There has been much public discussion in recent months of the financial plight of private higher education and of the role that private business corporations can and should play in overcoming it. The basic facts are becoming common knowledge. Our private schools are caught in the squeeze between inflation, on the one hand, and low interest rates and a preponderance of fixed income investments, on the other. Tuition increases, although substantial, have not closed the gap and most likely cannot. At the same time federal tax policies have tended to dry up the large personal fortunes to which many institutions could turn in the past. The result is that our private colleges and universities face "crippling deficits" or "drastic curtailment of services indispensable to the public interest",[1] which may easily lead to the disappearance of private higher education as an important force in our national life.

Most schools are trying every means of securing fresh revenue and new capital. Annual alumni campaigns seeking smaller gifts on a recurring basis have had some notable successes. Incidental assistance may come from the large foundations, but this must not be exaggerated.[2] Apart from limited resources, the foundations, as a matter of general policy, support only pilot studies where they will do the most good (not ordinary operating costs), and the net effect of a grant for a special project may be an increase to university overhead.

For these reasons the schools are turning to private business corporations as the last large and growing accumulations of private wealth from which help can come. At the same time many prominent representatives of corporate management are turning to private educational institutions not only as specific sources of trained personnel and technical information but also in the aggregate as a mighty bulwark of economic and political freedom.[3] A recent survey indicates a remarkable increase in corporate giving in the last few years, with the estimated total for 1951 of over $300 million (of which about one-fifth goes to education), as compared with an average total for 1936-1939 of only $30 million.[4] This is an important amount, even though still far short of the $2.2 *billion* which Ruml and Geiger estimate as 5 per cent of corporate income—the maximum deductible un-

1. As reported by the Commission on Financing Higher Education, a private group sponsored by the Association of American Universities and financed by the Rockefeller Foundation and the Carnegie Corporation.

2. In his report to the Alumni of Yale University, November, 1951, President Griswold said: "The total contributions of these foundations to American higher education cannot be estimated exactly, but it is probably no larger than 2 per cent. . . . In a purely quantitative sense, they are no substitute for new capital."

3. The list is impressive: Laird Bell, "If Corporations Will Give", 181 *Atlantic Monthly* 68 (May, 1948); Alfred P. Sloan, "Big Business Must Help Our Colleges", 127 *Collier's* 13 (June 2, 1951); Irving S. Olds, "Our Mutual Ends", an address at the Alumni Dinner celebrating the 250th anniversary of Yale University, October 19, 1951; Ruml and Geiger, *The Five Percent* (rev. ed., October, 1951) (being Planning Pamphlet No. 73 of the National Planning Association, with an excellent discussion of the tax consequences of giving); Kenneth F. Burgess, One Hundred Years of Progress, an address to the Phi Beta Kappa Association of the Chicago Area, December 4, 1951.

4. See Andrews, "New Giant in Giving: Big Business", *New York Times*, December 2, 1951, §6, page 14, summarizing data collected by the author for the Russell Sage Foundation.

der Section 23 (q) of the Internal Revenue Code.

If Corporations Are To Help, They Must Contribute More

If business corporations are going to save, or even substantially help, private higher education, the annual contribution must certainly exceed the current $60 million and the gifts must extend from the present concentration upon scholarships for employees and upon research projects in the physical sciences to general support of the liberal arts and the learned professions. Whether business will respond to the challenge is not entirely for us as lawyers to say, but it is of professional importance to examine the legal obstructions to this highly desirable development. Mr. Olds, [see footnote 3, page 209] poses the legal problem:

> But [the corporation's] power to contribute is limited by the statutes of the particular state in which each of them is incorporated, and many state laws cast grave doubt upon the right of a corporation to donate the money of its stockholders unless the probability of immediate and direct benefit to the donor is clearly demonstrable. That is why they have not felt free generally to finance studies in the liberal arts and the humanities, even though the most difficult problems which American enterprise faces today are neither scientific nor technical, but lie chiefly in the realm of what is embraced in a liberal arts education. That such doubts should be resolved, either by judicial interpretation or by legislative amendment, is, I believe, an immediate and major responsibility of the managers and shareholders of every corporation which honestly desires to preserve free and independent education in America.

It behooves members of the Association to examine the source of these "grave doubts", their substance and measures which have been taken to remove them.

It must be confessed that at common law there is considerable uncertainty if we must rely on the letter of decided cases; uncertainty, that is, as to particular situations. The general rule is well settled: The authority of directors to disburse corporate funds is restricted to expenditures that are reasonably necessary or incidental to the business purpose of the corporation. This is the direct corporate benefit test.[5]

In the case of ordinary corporate expenditures, wide latitude is allowed for the "business judgment" of directors. The benefit to the corporation need not be a demonstrable and immediate cash profit; it may be a long range benefit, derived from the maintenance of healthy business conditions or from the avoidance of a loss. Fire and liability insurance, plant guards, contributions to industry associations and commodity advertising—all seek indirect, long-term, "diffused" corporate benefit. The authority of directors to spend corporate funds for such purposes is beyond question.

When it comes to corporate giving, however, the existing cases seem to have required a benefit rather quickly traceable to more profits. The courts have thought in terms of the advertising value of the gift or improvement of the locally available technical labor force or the customers which the charitable institution would bring or the increase in value of property held by the corporation through inducing the charity to establish itself nearby.[6] These are the cases that seem to create the grave doubt about which Mr. Olds complains.

Most of the Decided Cases Date from the Twenties or Before

The trouble is that most of the cases are old. There seem to be no modern cases in which a stockholder has challenged a charitable contribution. All the leading cases date from the early twenties or before. The acquiescence of stockholders in the giving away of many millions of corporate profits may attest to the caution and care of the directors, but it may easily be interpreted as indicating a general agreement among investors that corporations should be good citizens as well as far-sighted in their self-interest. Somewhat unfortunately this same acquiescence has prevented the deciding of cases during a period when economic and political conditions have been changing rapidly. It seems to us, therefore, to be ignoring the proved dynamic and progressive qualities of our common law to attempt to state the present rule in terms of yesterday's conditions rather than to apply the overriding principle of corporate benefit directly to the current state of affairs.

This involves no overruling of early cases. It involves only the wise recognition by our courts that what seemed to be too remote in the way of corporate benefit seventy, or even twenty, years ago, seems quite direct today. Times have changed and the specific activities of corporate directors must change with them if the corporation is to survive and prosper. The principle of change here is basic and we venture to guess that no corporation organized fifty years ago would still be in business if its directors were restricted to exactly those acts which were authorized the year it began. This is so obvious as to be trite when it comes to technical developments. What Mr. Olds and the others seem to be saying is that it should be no less obvious today in matters of political and economic and social developments.

Seventy years ago virtually every aspect of our society was favorable to private enterprise, business profits and political and economic freedom. For a board of directors at that time to have spent money for the avowed purpose of preserving the free enterprise system must have seemed an act of arrant folly. You do not put out hard cash to insure the rising of the sun. Today, in marked contrast, it scarcely requires the marshalling of data to support the observation that economic as well as political freedom is in jeopardy, that the maintenance of conditions favorable to private enterprise and business profit, far from resembling the rising of the sun, has become a major problem for all businessmen and for citizens generally. To say that an expenditure to this end today is unauthorized for want of direct corporate benefit, and to point to the *Hutton*

5. *Hutton v. West Cork Rwy. Co.*, 23 Ch.D. 654 (1883); *Armstrong Cork Co. v. H. A. Meldrum Co.*, 285 Fed. 58 (D.C. W.D.N.Y. 1922); Stevens, *Corporations* (2d ed. 1949) page 251.

6. Cousens, "Corporate Contributions to Charity", 35 Va. L. Rev., 401 (1949).

case as authority, is like condemning the expense of burying corporate records to avoid the effects of atomic bombing because it would have been wildly extravagant in 1883. And we take it that what the industrial leaders are saying is simply that private enterprise and the welfare of democracy have a very real stake in maintaining private higher education as a vigorous element in our national life. Mr. Burgess brought this out clearly in his address [note 3, page 209] to the Phi Beta Kappa Association:

> Being creatures of the free enterprise system and existing as an essential part of it, these business corporations thus have the . . . duty born of necessity to keep alive in full strength and vigor these guardians of freedom of the mind, freedom of thought and freedom of expression—the privately endowed universities of our times. Forward-looking corporate management will recognize . . . that it is in the interest of both the stockholders and the corporation itself that this vehicle of helping to preserve endowed universities [i. e. deductible corporate donations] be utilized to the fullest.

Whereas it is the great virtue and strength of the common law that it can develop to fit the needs of the times without losing its essential integrity, it is its vice that progress must be made largely over the dead bodies of unsuccessful litigants. Litigation is at best expensive and hazardous. Corporate directors have understandably not been eager to advance the law at their own risk. The solution, of course, should come through statutes.

In 1948, thirteen states[7] had statutes authorizing corporate donations, when the American Bar Association took action. At the Seattle Annual Meeting of September in that year, in his address to the Section of Corporation, Banking and Mercantile (now "Business") Law, Ray Garrett, of Chicago, Chairman of the Committee on Business Corporations (now the Committee on Corporate Laws), noted the growing disparity between the facts of the old case law and the present extent of corporate giving and suggested that a wider enactment of authorizing statutes would be beneficial. The following March, 1949, the Committee on Business Corporations sent to all secretaries of state and state bar association presidents a memorandum embodying its opinion that corporate giving had the general approval of management and stockholders and that it should be expressly authorized by statute. The committee recommended the inclusion, among the general powers of corporations, of the following: "To make donations for the public welfare or for charitable, scientific, or educational purposes." The same memorandum was circularized in September, 1950. Thirteen states have since enacted statutes, eight of these using the Committee's language,[8] and the clause has been included in the Association's Model Business Corporation Act. The present total is twenty-six states plus Hawaii and the National Banking Act.

As far as these statutes apply, they seem to answer Mr. Olds' complaint satisfactorily, although there is a regrettable variation in phraseology that may produce differences in marginal cases. Most of the statutes expressly include educational institutions as permissible donees. Most of the others use a general phrase like "charitable" or "charitable or eleemosynary", which certainly includes education. There are variations as to types of corporations covered by the different statutes and some impose a requirement that the donees must be in a "community in which the corporation is doing business" (Massachusetts, for example); a few, notably Indiana, New Jersey and Tennessee, limit the amount that may be given. However, even with these peculiar limitations, the statutes are broad in their grant of authority and should suffice.

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Pre-Existing Corporations Present No Real Problem

The most important remaining

7. Colo., Md., Mass., Mich., Mo., N.J., N.Y., N.C., Ohio, Penn., Tenn., Texas, and Va.

8. Those using the Committee's language: Ark., Calif., Conn., Del., Ill., Me., N.M., Wis. Other states: Ind., Kan., Minn., Okla., W.Va. (Some, like Del. and Ill., were substantial amendments of earlier provisions.)

difficulty is the question of the applicability of the statutes to pre-existing corporations. Much of the good which the statutes are designed to achieve, indeed most of it, will be thwarted if the statutes apply only to corporations organized subsequent to their effective dates or even if there is a serious doubt on the matter. For most states, fortunately, there seems to be no reason to doubt. It has long been customary to include a reserved power clause in corporation acts and often in state constitutions, to enable the legislature to change corporate charters despite the *Dartmouth College* case.[9] Since practically all existing corporations are subject to a reserved power clause, and since most courts which have dealt with the question have held that this reserved power runs to all aspects of the charter,[10] the new corporate donation statutes should clearly apply to pre-existing corporations in the great majority of the states. The only substantial doubt may arise under the restricted, or "New Jersey", view of the scope of the reserved power, which bears more extended examination.

In Section 6 of the General Act of 1846, the New Jersey legislature provided ". . . that the charter of every corporation which shall hereafter be granted . . . shall be subject to alteration, suspension and repeal in the discretion of the legislature."[11]

In 1856, the Hackensack Railroad was chartered to run from Paterson to Hackensack in New Jersey, a distance of about five miles. In 1861, the legislature amended the charter to authorize the extension of the line from Hackensack north to the state line and beyond to join the Erie Road, about twelve miles. Shortly thereafter the directors proposed a mortgage to finance the extension, and a minority stockholder sought an injunction. This the Chancellor granted.[12] He cited the earlier English case of *Natusch* v. *Irving*[13] to the effect that a partnership could not change its business purpose without unanimous consent of the partners, despite parliamentary authorization, and concluded that "It was to avoid the rule in the Dartmouth College case, not that in *Natusch* v. *Irving*, that the change was made"—the "change" being the reserved power clause set out above.

Thus was born the "Zabriskie doctrine", that the reserved power runs to the contract between the state and the corporation but not to the contract among the stockholders or between the stockholders and the corporation. And this is the doctrine that casts a shadow over the complete effectiveness of corporate donation statutes in New Jersey[14] and the handful of other states that seem to have followed New Jersey in this respect.

There is little to be said in its favor. As a statement of probable legislative intention it seems unlikely. No doubt the legislature had the *Dartmouth College* case in mind in reserving the power, but that does not mean that it meant to protect itself only against the precise difficulty that arose in that case and no other. Surely it is more reasonable to suppose that the legislature sought protection against the whole category of difficulties suggested by the case, including the rights of stockholders against each other and against the corporation, for the state is severely limited if desirable changes in corporate structure are forever subject to the veto of individual stockholders. Even without a positive dissent, the requirement of unanimous approval is tantamount to a prohibition for many of our large and widely held corporations.

Nor is there anything in the language of the reserved power clause which supports the limited view of the Zabriskie doctrine. In fact, the prima facie case is all the other way, for it is well established that the charter embodies the stockholder's contract with other stockholders and the corporation as well as that of the corporation with the state. A power to change the charter, without more, should be a power to change all three contracts.

The Zabriskie doctrine bears the strong imprint of its date. Contemplating small associations of businessmen, corporations which differed from partnerships primarily in sanction from the sovereign and limited liability, it was perhaps natural for a chancellor of that day to grab at any straw of an argument to protect what had been the important rights of business associates. Size, both in amount of capital and number of members, is today a far more significant differentiation. Bigness makes any requirement of unanimity anachronistic. Modern industrial enterprises must retain flexibility for adjustment to changing conditions of doing business. Neither individual investors nor the economy generally can afford to have large enterprises liquidated to suit the whims of minority stockholders. And such, of course, is the ultimate effect of the Zabriskie doctrine; it would limit the life of an enterprise to that period in which the guesses of the legislature and the incorporators at the time of incorporation remained tolerably workable.

It is important in this respect not to leap to the conclusion that the Zabriskie doctrine is the only means of protecting minority stockholders from grossly unfair treatment.[15] There are other techniques much more neatly suited to the purpose without such broad, harmful effects. Equitable tests of fairness, perhaps the concept of vested rights, and ap-

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9. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819), which held that a corporate charter was within the protection of the impairment of obligation clause of the United States Constitution.

10. *Durfee* v. *Old Colony & Fall River RR.*, 5 Allen 230 (Mass. 1862), is the leading case accepting the broad scope of the reserved power. See Note in Dodd & Baker, *Cases and Materials on Corporations* (2d ed. 1951) page 1319.

11. The modern successor to this provision is N.J.S.A. 14:2-9. The reserved power, in substantially the same terms, is found in the N.J. Constitution, Art. 4, § 7, Par. 9 (Par. 11 in the former Constitution of 1844).

12. *Zabriskie* v. *Hackensack & N.Y. RR.*, 18 N.J. Eq. 178 (1867).

13. 2 Coop. T. Catt 358 (1824), Gow on *Partnership*, App. II 404 (2d Eng. ed. 1825).

14. N.J.S.A. 14:3-13 (As amended by Laws 1949, c. 171) and the special act in Laws 1950, c. 220.

15. There is a suggestion that this was on the mind of the Ohio court when it recently gave support to the Zabriskie doctrine in *Wheatley* v. *A.I. Root Co.*, 147 Ohio St. 127, 69 N.E. 2d 187 (1946). See the very excellent article by Prof. Lattin, "A Primer on Fundamental Corporate Changes", 1 *West. Res. L. Rev.* 3 (1949).

Naval Procurement During World War II:

Its Legal Aspects

by J. Henry Neale • of the New York Bar (Scarsdale)

■ This article is a report prepared for the Survey of the Legal Profession.

The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

Reports are released for publication in legal periodicals, law reviews, magazines and other media as soon as they have been approved by the Survey Council's Committee on Publications.

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When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

■ Prior to the mobilization and defense efforts preceding World War II, the only legal office in the Navy Department was the Office of the Judge Advocate General. It had cognizance of all legal matters, both civil and military. The JAG's office, as it was called, was manned traditionally in the same way as the various Navy bureaus. Naval and civilian personnel were mixed together, but the civilian lawyers in the office were largely long-time government civil service employees in the lower grades, with little or no experience in the private practice of law. The most important posts were filled by Naval officers.

The practice for some years had been to have a certain number of young regular officers of the Navy attend a civilian law school during one of their stretches of shore duty. After graduation from law school they would alternate between regular line billets afloat and positions in the Office of the Judge Advocate General in the Navy Department in Washington or comparable legal duties elsewhere. Generally speaking, JAG officers served long terms of regular line duty followed by short legal assignments. In the words of a student of the workings of the Navy Department prior to and during World War II, "It was assumed that it was much more important for the Judge Advocate General to know the bow from the stern of a ship and to have a 'feel' for the problems of Naval discipline, than it was for him to be skilled in the intricacies of contract or civilian law".[1]

Peacetime Naval Procurement Presented Few Legal Problems

As a practical matter, there was not much need for highly skilled and experienced attorneys for there were few civil or commercial legal problems. Peacetime government procurement was to a great extent a mechanical process. With very few exceptions, contracts were awarded after competitive bidding, and were formalized by contracts of standard form. Under such a system there was no negotiation or bargaining over contract terms. Except for the preparation of specifications, contract writing was largely a matter of filling in blanks. Lawyers were needed only for the most general advice. The practice became established that if a contracting bureau wished legal advice, it could submit a request to the JAG's office. The specific question would be answered in due course after both request and answer had pursued their tortuous way through channels. No unsolicited advice or legal guidance was offered and a problem would be dealt with only when a specific question was asked.

After the fall of the Low Countries and the collapse of France in mid-1940, the tempo of mobilization for defense in this country speeded up. Congress passed two statutes that made a change in the legal set-up of the Navy imperative. Constructive measures to meet the new situation, however, were taken only after a long period of time and much travail. The first of these new statutes was the Act of June 28, 1940,[2] which

1. Robert H. Connery, *The Navy and the Industrial Mobilization in World War II*, Princeton University Press (1951), pages 68, 69.

2. Public Law 671, 76th Congress.

authorized the Navy to dispense with the competitive bidding requirements of the existing law in certain cases and to negotiate directly with individual contractors. The second major new statute was the Second Revenue Act of 1940,[3] which contained a provision designed to encourage the investment of private capital in industrial facilities especially needed for war. This permitted funds so invested to be amortized within the short period of five years, if the War or Navy Department certified that the new plant was necessary for the war effort and their owners were not reimbursed by the Government in another way.

Another important action taken by Congress in 1940, not directly connected with any legal problems of the Navy but which turned out to have a far-reaching effect on these matters, was the creation of the new office of Under Secretary of the Navy. This post was filled on August 22, 1940, by the appointment of James Forrestal, and Secretary of the Navy Knox immediately assigned to the Under Secretary contracts, tax and legal matters.

The defects of the existing system of legal services first became apparent to Mr. Forrestal in the handling of the tax amortization certificates under the second of the two statutes referred to above, perhaps because this was a new field and not subject to handling under established procedures. The Office of the Judge Advocate General undertook the responsibility of reviewing the applications for these tax amortization certificates sought by Navy contractors, but did not guide the bureaus of the Navy in the requirements of the statutes and the regulations thereunder. Very few of the great mass of applications presented were granted in the first three months of the statute. Mr. Forrestal became greatly concerned. He then took a step that was eventually to prove the beginning of a complete overhaul in the Navy legal system. He requested H. Struve Hensel, then a partner of Milbank, Tweed and Hope in New York, and W. John Kenney, a lawyer practicing in Los Angeles, to become his special assistants to clean up the log jam in the tax amortization applications. These men arrived early in January, 1941, planning to stay for about sixty days. Both remained for well over five years. In the course of that time they were instrumental in revolutionizing the legal services in the Navy and in establishing an efficient and exceedingly competent legal unit in the Navy Department, staffed by lawyers trained in commercial and industrial practices.

Within a short time considerable progress was made in improving tax certification methods, with the establishment of a Certification Supervisory Unit in the Under Secretary's Office, staffed by Hensel and Kenney with several associate attorneys recruited from private practice in New York. Mr. Forrestal next decided to attack the problem of contracting procedure. He asked Mr. Hensel to make a study of the methods by which contracts were made and signed in the Navy Department. Hensel's report pointed out the serious defects in the existing system, particularly the lack of legal supervision and protection. One of his recommendations was that a Procurement Legal Division be created, with a civilian lawyer of established ability at its head and with associates acting as special counsel in the material bureaus, *i.e.*, Ships, Ordnance, Aeronautics, and Supplies and Accounts. He recommended that all activities with respect to the preparation or examination of contracts should be centered in this office, which was to be kept civilian in its personnel and free from naval channels.

Procurement Legal Division Set Up in 1941

These recommendations, submitted in March, 1941, met strong opposition from the Judge Advocate General. An attempt to secure statutory authorization for a separate legal division and additional legal personnel was opposed in the House Naval Affairs Committee and was unsuccessful. However, in July, 1941, Mr. Forrestal announced that he would go ahead anyway and establish the division as a part of his office, and formally announced it to the Department on September 10, 1941, the purpose being then stated "to assist in expediting procurement". At this time twelve lawyers had already been retained as special assistants to the Under Secretary on a *per diem* basis. These attorneys were engaged either in assisting the Chiefs of the Bureaus in the negotiation and preparation of contracts, in work dealing with the Certification Supervisory Unit, or on special assignments. Most of these men became members of the staff of the new division.

Unfortunately the Procurement Legal Division continued to have the hostility of the Office of the Judge Advocate General for some time. In addition most of the bureaus were exceedingly cool to it and other Navy officers from time to time sought to restore procurement legal matters to the Judge Advocate General. There were several reasons for this opposition: one, of course, was jealousy and distaste of losing authority and jurisdiction; another was disapproval of having personnel in a bureau who did not report to the bureau chief but directly to the Under Secretary; still another was general opposition to a strong administrative control by the civilian administrators of the Department. Finally, there was the feeling, unfortunately too common among laymen and particularly among naval officers, of distrust of lawyers in general; lawyers were regarded as obstructionists who would interfere with "getting the work done". The result was that the Division did not immediately have the usefulness that it should have had. By directive of the Secretary, all large contracts had to have the approval of a representative of the Procurement Legal Division as to their form before execution. Otherwise than that, it was left to the bureaus to determine for themselves the extent to which to

3. Public Law 801, 76th Congress, October 8, 1940.

avail themselves of the services of the lawyers in the Procurement Legal Division. Some of the bureaus ignored the lawyers assigned to them as much as possible and endeavored to carry on their work without legal counsel of any sort. Others attempted to establish a legal office of their own. One or two were more cooperative and welcomed the assistance that was offered. By the outbreak of the war, there were still only ten men in the Division and much work remained undone, although some improvement in contract drafting had been accomplished.

Within two weeks after Pearl Harbor came the First War Powers Act[4], which threw wide open the contracting authority of the Navy Department, followed by Executive Order 9001 and the directive of the War Production Board prescribing negotiated contracts. This meant that contract provisions of all Navy contracts as well as prices became the subject of negotiation and a wide field that called for expert legal guidance was opened up. And of course the size of the material program of the Navy grew by leaps and bounds, so that the very magnitude of the task in those early days of the war caused great confusion and difficulty, even without the complicated legal questions engendered by the change in legal rules and principles for procurement.

From the legal standpoint, intricate problems were involved with respect to the construction, use and disposition of government-owned facilities, the making of partial and advance payments, performance bonds, guarantees, patent indemnification and licenses, cost determinations, price redeterminations and escalator clauses, excise taxes, termination agreements and a multitude of other matters which required individual negotiation and expert draftsmanship. Then, also, the First War Powers Act allowed the amendment or modification of contracts without regard to other provisions of law whenever such action "would facilitate the prosecution of the war", and this opened up another wide field that called for expert legal guidance.

Procurement Legal Division Faces Continued Opposition

Nevertheless, for the first year after Pearl Harbor, the Navy Department tried to get along as much as possible with its former system of proceeding without the guidance of lawyers who were trained and experienced in commercial matters, and used makeshift arrangements. The Procurement Legal Division increased somewhat in size, but in the main was faced with a continuous running battle with those who opposed the idea of having a special group of lawyers taking part in the procurement program. It also had to struggle against the general lethargy and passive opposition that resisted, and frequently blocked, any real change in organization and procedures. Some of the bureaus, while refusing to take full advantage of the aid the Procurement Legal Division offered, endeavored to bring in reserve officers with good legal backgrounds and experience to function as part of the bureau organization and furnish legal services. These lawyers found themselves handicapped by lack of direction and the absence of any co-ordinating body that could consider the Navy's procurement problems as a whole, as well as by the failure of the other naval officers in the Bureau either to recognize the need for any legal help, or to avail themselves fully of the training and experience of these lawyers. Other bureaus, failing to comprehend that there were any special legal problems involved, tried to carry on without legal advice. In such cases, snarls developed and the whole procurement process bogged down. In addition, future difficulties were being built up by lack of carefully drawn contracts and amendments, so that the Government was being laid open to litigation with contractors and the Navy Department was being faced with disputes with the Comptroller General and other government agencies.

The Procurement Legal Division, under the leadership of Hensel and Kenney, tried diligently to make the best of the situation and to render as much assistance as possible. Its personnel grew in numbers and these men, located in the various bureaus, with the Secretary's directives to back them up, were able to review the large contracts and to catch the most glaring errors. But more adequate and better organized legal services became increasingly necessary and finally, on December 13, 1942, Under Secretary Forrestal issued a directive which reorganized the procurement procedures of the Navy and laid down definitive rules regarding legal advice and services. He directed that "in order that all legal advice and services relating to procurement may be co-ordinated in each Bureau and in the Navy Department, there shall be a single legal division in each Bureau to render such advice and perform such services", these legal services to be co-ordinated and generally supervised on behalf of the Secretary by the Chief of the Procurement Legal Division.

From that time on things ran more smoothly. A counsel was appointed for each contracting bureau —Aeronautics, Naval Personnel, Ordnance, Ships, Supplies and Accounts, and Yards and Docks—heading up the legal activities in that Bureau with a staff of additional lawyers performing various legal functions under his direction. Later, special units were established to deal with such matters as patents, renegotiation, financing of Navy contractors, contract termination and property disposal, and in the Office of the Fiscal Director of the Navy and the Office of Research and Inventions, and counsel were also assigned to some of the various field activities of the Navy Department. The Central Office, purposely kept small, handled the issuance of procurement directives and co-ordinated the work of the lawyers in the bureaus so that the contractors would receive uni-

4. Public Law 354, 77th Congress, December 18, 1941.

form treatment and opinions on the same facts. The work of the Central Office included the maintenance of relations with other Government departments and agencies such as the Army, Department of Justice, the Comptroller General's Office and the numerous wartime special agencies, and the handling of matters which affected the operation of more than one bureau or office or which did not fall within the operations of a particular bureau.

Division Begins To Handle Most of Navy's Commercial Law Work

The Procurement Legal Division gradually increased in size. As the effective aid that skilled lawyers could render in such a program was demonstrated to those charged with the responsibility for procurement of the manifold items needed for the expanding wartime Navy, the division steadily gained the respect and recognition of the Department. More and more duties were assigned to the division, until virtually all matters of commercial law in any way involving the Navy, except admiralty matters, state taxation, and acquisition of real estate, were handled by it. In addition, its members were called on for assistance as "trouble shooters" or for fact-finding or general guidance in a variety of other matters. In 1944, in order that the function of the organization be more adequately described, its name was changed from the Procurement Legal Division to the Office of the General Counsel for the Department of the Navy, with "cognizance of all legal matters relating to the procurement or disposition of naval matériel and facilities and such other legal duties as may be assigned by the Secretary of the Navy". Mr. Hensel became General Counsel and served as such until he was appointed Assistant Secretary of the Navy, when he was succeeded by Mr. Kenney, who in turn later also became Assistant Secretary and after that Under Secretary.

The office reached a peak staff of about 160 lawyers at the time of the Japanese surrender. About three-fourths of these were distributed among twelve bureaus and offices of the Navy Department in Washington and the remainder were on assignment in some fifteen or more field activities or branch offices of the Department in eight cities. Most of these lawyers were reserve officers, but a few were civilians. As a matter of policy, because of the importance of maintaining independence of thought and action on strictly legal matters, and also because of the difficulty of reconciling the responsibility involved with the traditional qualifications for adequate officer rank, the General Counsel, the two Assistant General Counsel and the Counsel to the various bureaus and the more important offices were all civilians. In other words, it was considered important that the key-men in the organization be free to give advice or direction on legal matters without being subject to the orders of, or being outranked by, those receiving the advice.

The principle was adopted from the start that personnel would be selected and assigned on the basis of legal ability, recognizing that commercial legal matters should be handled and supervised by lawyers of ability and experience in that field, and that military rank or experience was of no moment. Further, inasmuch as it had been determined that naval channels were not adaptable to the efficient performance of legal services, regular naval channels were eliminated to the extent practicable and commercial practices substituted. Also, somewhat contrary to the practice in many government departments and particularly in the Navy Department prior to the war, the lawyers in the Office of the General Counsel were not content merely to rule on whether or not a particular thing would be "legal". Instead, they would also point out what the consequences of the proposed action would be and in addition, wherever possible, performed the vastly more important function of devising legal means to accomplish the desired result.

General Counsel's Office Operated Like Law Firm

The office functioned very much as a large law firm, with the top men assigned responsibilities and "clients" just as if they were partners engaged in private practice. The General Counsel was regarded more as the senior partner than as the chief in a governmental bureau. Men were assigned to particular jobs for which they had special abilities and were then given responsibility for their work. The operation of the office being conceived primarily as a service organization rather than as a top echelon policing activity, services were rendered at the working level. In the words of Professor Connery, in his work on the matériel organization of the Navy, "The Navy was able to enter the procurement negotiations with legal talent as able as any that private business could muster."[5]

This is but a brief sketch of the origin, development and final fruition of the special services rendered by lawyers in the Navy's matériel program and in the multitude of other matters comprised under the general head of "commercial law" during World War II. The record can best be summed up by quoting from the letter of thanks addressed by the President of the United States to Mr. Hensel in accepting his resignation as Assistant Secretary of the Navy. Mr. Truman there said that the "efficient central legal office in the Navy Department, . . . organized along the lines of a law firm and staffed with some of the outstanding lawyers of the country, was a vital factor in the excellent procurement record of the department during the war".[6]

5. Connery, op. cit., page 430.
6. New York Times, January 17, 1946.

Patent Law: The British Trend

■ The following interesting and timely comment on patent law was written by The Right Honorable Sir Lional Heald before he became the new Attorney General in Prime Minister Churchill's Cabinet. As King's Counsel, he participated in the trial of patent cases. He points out that the British courts went through much the same difficulty that we are going through here.

■ I always enjoy reading the discussions of patent problems in your JOURNAL, and I found the article in the May issue entitled "The Judicial Erosion of Our Patent System" particularly interesting, because we went through a similar crisis here just before the war. With no easily assignable cause, there was a distinct sense of hostility against patents and it was not uncommon for judges to make observations quite as strong as those attributed to Mr. Justice Jackson in the *Great Atlantic and Pacific Tea* case. In fact, by 1939, so hazardous an operation had a patent infringement action become, from the plaintiff's point of view, that experienced lawyers here were beginning to take the same dim view of patents as legal weapons that appears now to be widely held in the United States.

Today the judicial atmosphere is quite different, and although our courts are still very strict about the form of the specification, especially in relation to undue width of claim, a patentee who has made a real contribution to some art or industry can reasonably hope to succeed, even though, as Mr. Posnack puts it, his invention "departs only slightly from what has gone before—or is a mere gadget".

There seems therefore at the moment to be a divergence between the trends of authority in our respective countries and it occurs to me that a brief analysis of the nature and extent of this might assist those of our legal brethren on your side who are, like Mr. Posnack, concerned to find means of restoring the balance in favor of the patentee.

The outstanding feature of recent United States decisions seems to be the introduction of a *subjective* approach to the criterion of patentable subject-matter, resulting in a kind of "quantum theory" of invention according to which some particular degree of ingenuity is required. It is significant that this is precisely the approach that has been pressed on our courts in recent years and conclusively rejected on the authority of two consecutive decisions of the House of Lords. This attempt to limit the permissible area of subject matter by judicial rulings followed a determined but unsuccessful effort by the purists to incorporate a hard and fast definition of "invention", when the amendment of the Patents Act was under consideration after the war. Wiser counsels fortunately prevailed, and the statutory criterion remained simply, in the words of the Statute of James, "a manner of new manufacture", except for the addition by the 1932 Act of the specific requirement that there must be an "inventive step" over and above the prior art.

The recent decisions of the House of Lords, already mentioned, have therefore involved careful consideration of just the kind of problem discussed by Mr. Posnack and, in the opinions delivered by the law lords and the judgments of the Court of Appeal which they affirmed, there is evidence of a marked swing away from any prejudice against patents and of strong resistance to ingenious arguments designed for their destruction. It is also particularly to be noted that in both these cases the departure from what had gone before was certainly slight, if measured in absolute terms of mechanical or electrical ingenuity, and the patented device was, in the most ordinary sense of the word, a "gadget". These facts did not, however, impress the tribunal, which was much more concerned with the practical utility of the device and its value to the public, as evidenced by their response, there being convincing proof of a real improvement.

In the first case, *Raleigh* v. *Miller*[1], the subject of the patent was a dynamo for the lighting of a pedal-bicycle, the novelty of which consisted in the fact that instead of being an accessory, attached to the frame and operating by means of a geared friction pulley, the dynamo became a component part of the bicycle itself, since it replaced the hub of one of the wheels and had the spokes connected directly to its rotor. Although having only twenty poles and rotating at wheel speed *(i.e.,* about one revolution per second) it was found, rather surprisingly, that the device was capable of giving a satisfactory light, in addition to its advantages over the friction type, notably in greater cleanliness and in the elimination of the braking effect which required increased exertion from the cyclist.

In the first court the patent was held to be wholly invalid, the trial judge finding that the construction of a gearless hub-dynamo was "a mere matter of design", incapable of supporting a patent, since the patentees had not exercised a sufficient degree of inventive ingenuity. On appeal the patentees successfully argued that the trial judge was in error in supposing that any mechanical or electrical ingenuity was necessary in law; that the degree of inventive merit was immaterial, and that any "subjective" criterion of invention was out of place, the only reasonable inference from the facts proved being that an inventive step had in fact been required to provide a new and useful combination, the conception of which was by no means

1. *Raleigh Cycle Co. Ltd. & Rawlings v. H. Miller & Co. Ltd.*, 63 R.P.C. 113, 65 R.P.C. 141.

obvious. Although the law lords differed on other aspects of the case, they were unanimous in the view that there was adequate subject matter.

In effect the Superior Courts adopted and reaffirmed the line of reasoning laid down some forty years earlier by Lord Moulton, a great lawyer who was also a scientist of international repute. He had insisted[2] that the processes operating in the mind of the inventor were immaterial, the relevant inquiry being essentially *objective* and patents being granted as a reward for practical achievements, not for mental exercises. He also held[3] that an *idea* could properly form the basis of a valid patent, even if no technical ingenuity were required to carry it into effect. Finally[4] he strongly condemned the argument of obviousness based on "*ex post facto* analysis of invention" as being both "unfair to inventors" and "not countenanced by English patent law".

This approach of Lord Moulton was in turn a reflection of views expressed sixty years before in the famous "anthracite hot blast" case (*Crane* v. *Price*),[5] which has since been doubted on the facts but has always been considered to be sound in legal principle. In the course of the hearing the Attorney-General, whose argument was accepted by the court, made the following very pertinent remarks: "Observations respecting the amount of invention or its sufficiency to support letters patent cannot be relied on, and reasoning of that kind is extremely fallacious. The perfection of invention is simplicity of means to the end. What test or measure can exist of the amount or magnitude of the invention? The only practical test is its benefit and utility."

The House of Lords also approved the application by the Court of Appeal of the criterion of patentable subject matter acted on in 1929 by Lord Tomlin (then a judge of first instance but later an outstanding member of the highest tribunal) in the case of *Samuel Parkes* v. *Cocker Brothers*.[6] The patented device in that case was simply an improved label clip for railway wagons, and was certainly open to all the strictures applied by the Supreme Court in the case referred to by Mr. Posnack. Yet this is what Lord Tomlin said: "Nobody has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguishes invention from a workshop improvement. Day is day and night is night, but who shall tell when day ends or night begins? . . . The truth is that when once it has been found, as I find here, that the problem had wanted solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present the necessary scintilla of invention necessary to support the Patent."

This statement of Lord Tomlin has now assumed first-class importance in our patent law, since it was again expressly quoted in the leading opinion delivered in the House of Lords in the subsequent case of *Glacier Metal* v. *Cleveland Graphite*.[7] There the subject matter of the patent was the conception of a thin and flexible bearing liner for internal combustion engines in place of the thick and rigid type of liner previously in use. The difference was simply one of weight and dimensions and it was again strongly contended by the Defendants that this was "a mere matter of design"; but the House of Lords affirmed the Court of Appeal in upholding the patent, relying on the striking testimony of automobile and aeroengineers as to the revolutionary change in practice involved, and its impact on engine design. Once novelty was established, they held, the test suggested by Lord Tomlin was conclusive on the facts of the case.

The House of Lords also swept aside the attempt of the defendants to rely on the argument of "ex post facto obviousness", to which Lord Moulton took such strong exception, on the simple ground: "If obvious, why not done before?" Incidentally, counsel for the patentees had been able to cite an unusual authority on this point in the shape of PARADISE LOST, Book VI, where Milton describes Satan's invention of gunpowder:

> The invention all admired, and each how he
> To be the inventor missed; so easy it seemed,
> Once found, which yet unfound, most would have thought
> Impossible.

It will, I think, be clear from these two fully authoritative decisions of the House of Lords that the present attitude of judicial opinion in this country is far from hostile to patentees. The change is due no doubt to some extent to personal considerations, which it would be unseemly for any member of the Bar to discuss, but I believe that another big factor has been a real change in the methods of preparation and presentation of patent cases. Patent litigation before the war had come to be too much associated with technical subtleties and ingenious scientific hypotheses and undue reliance was placed on the argumentative evidence of "court experts". This coincided with extreme specialization at the Bar and a consequent tendency to ignore or at least to attach little weight to general legal principles or the rules of evidence. The inevitable consequence was to stimulate judicial suspicion of the whole "patents racket".

Since the war, the use of more straightforward methods of advocacy has resulted not only in a more prac-

(Continued on page 233)

2. *British United Shoe Machinery Co.* v. *Fussell*, 25 R.P.C. 631, 651.

3. *Hickton's Patent Syndicate* v. *Patents & Machine Improvements Co.*, 26 R.P.C. 339.

4. *British Westinghouse Electric & Mfg. Co.* v. *Braulik*, 27 R.P.C. 339.

5. *Crane* v. *Price*, [1842] 1 Webster 375, 401-2, 409.

6. *Samuel Parkes* v. *Cocker Brothers, Ltd.*, 46 R.P.C. 241, 248.

7. *Glacier Metal Co. Ltd.* v. *Cleveland Graphite Bronze Co., Ltd., and Vandervell Products Limited*, 67 R.P.C. 149, 156.

THE PRESIDENT'S PAGE

Trout-Ware

HOWARD L. BARKDULL

Regional Meetings

■ From the standpoint of the American Bar Association, Regional Meetings are an item of major importance. A large percentage of our membership is unable to attend the Annual Meeting and the comment is frequently made to me that the Association means little to most of the members, aside from the receipt of the JOURNAL each month.

By bringing the organization to a place within easy driving distance of your own home we are trying to overcome this handicap and to give to our membership at close range, person to person, the benefits of the American Bar Association and the work being done by the Committees and Sections.

Louisville, April 9-12

Within a few weeks after the present issue of the JOURNAL is delivered to your desk, the first of two Regional Meetings scheduled for the present year will be held at Louisville, Kentucky. It begins Wednesday evening, April 9, and extends through Saturday, April 12. This is known as the Ohio Valley Regional Meeting and includes the States of Kentucky, Illinois, Indiana, Michigan, Ohio and West Virginia. Blakey Helm is the local Chairman.

A most cordial invitation is extended to all members of the Bar, their wives and families, not only from the states officially sponsoring each meeting, but from any other city or town wherever located. I have heard many lawyers in the South say that they are planning to come to Louisville even though they are quite a distance removed.

One of the happiest aspects of a Regional Meeting is the fine atmosphere of good fellowship. The lawyers have a good time among themselves and in addition there is a program of entertainment. At Louisville an entire day will be given over to a trip by private automobile to Lexington, visiting some of the great horse farms. There will also be an opportunity to attend one or two races, and to participate in the hospitality for which the State of Kentucky is so famous.

Yellowstone Park, June 17-19

Two months following the Louisville sessions the second Regional Meeting will be held at Yellowstone Park, June 17-19, composed of the States of Colorado, Wyoming, Montana, Utah, Idaho and Oregon under the leadership of W. J. Jameson. There will be many lawyers and their families making the trip to Yellowstone in June, not only from the Rocky Mountain states but from great distances. This occasion will be combined with their vacation plans and they will find it most agreeable to drop in at Yellowstone Park during the course of their journey, whether they travel by automobile, rail or air.

At both meetings, the workshop sessions will occupy a considerable amount of the available time. This is as it should be, as a part of the general plan of giving to the individual lawyer the benefit of new developments in the practice to the end that he may be kept up to date, abreast of the times and fully informed.

Every effort is being made by the committees in charge to bring these two occasions to the same high level of excellence established last year by the sessions at Atlanta in March and at Dallas in April. Later on it may be possible to hold more than two Regional Meetings during an Association year, but for the present the policy is being pursued of emphasizing quality rather than quantity, making certain that each meeting is of a high standard, well worthy of the time and expense of the member of the Bar who attends and brings his wife. The invitation to you is a sincere one. Should there be any doubt on your part, put the question up to your better half and I feel certain that the decision will be in favor of making the trip.

Traveling Schedule

Following a welcome respite from traveling, over the Christmas holidays, I resumed the itinerary with a trip to Atlanta, addressing the Lawyers Club and renewing many friendships made during the course of the Regional Meeting there in March of last year. The Atlanta trip was followed by an appearance before the Los Angeles Bar Association and Lawyers Club, carrying out the policy of encouraging in every possible way the Annual Meeting of next September. I find that there is genuine enthusiasm among the members of the California Bar over the prospect of having the American Bar Association as their guests in September. You should give serious consideration to a trip to San Francisco for the week of September 15 as part of your 1952 vacation.

On the way back from the West Coast I stopped in Chicago for a meeting of the Administration Committee, considering in advance a number of items scheduled to come before the Board of Governors at the time of the Mid-Year Meeting in February and making preliminary plans for the San Francisco program of next September.

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EDITORIAL OFFICE

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■ *The Bar Must Serve the Public Well*

Most of us who believe in our economic system believe also that the amount that a man earns has a pretty close relation to the extent of his contribution to society. If that is true, the lawyer's contribution to society has in the last twenty years been decreasing in relation to the contribution of the doctor. As appears from the article in this issue, aptly entitled "Economic Inventory of the Legal Profession", doctors and lawyers in 1929 had roughly the same average income, but since then doctors' incomes have increased 125 per cent and lawyers' only 46 per cent. The author suggests that two reasons for this difference may be, first, that the doctor when he hangs out his shingle is better educated for actual practice than the lawyer and, second, that the doctor keeps on with his education more thoroughly than the lawyer.

Perhaps the unfavorable comparison is a fair one. We are all familiar with the fresh product of the law school who has only book learning and with the older lawyer who refuses to recognize any developments in the law which have occurred since his graduation from law school. The lawyer of the preceding generation who read law in a practitioner's office learned how law was practiced and something about legal reasoning, but a lawyer whose law school education has been confined to the study of decided cases, no matter how much he knows about legal reasoning, knows nothing about how to practice law. So too the lawyer who relies on his law-school-acquired aptitude for legal reasoning and expects to acquire the requisite detailed information in a labor law, or tax law, or securities law matter between the time that his client consults him and the time when it is necessary to act is simply failing to render the service to which his client is entitled.

The lawyer must furnish a *quid pro quo*. Membership in the Bar does not confer on him a franchise to levy tolls on the public like the robber baron who holds the highway at the only pass over the mountain range. The failure of our incomes to keep pace with the decline in the purchasing power of the dollar indicates that, for the reasons given or others, we are failing to render the service that we used to. Yet if we are to retain our exclusive right to practice law we must render service. Indeed we must render it better and cheaper than anyone else can do it.

No one can doubt the advantages accruing to society in disqualifying all except officers of the courts of law from undertaking the delicate fiduciary relationship involved in assisting the members of the public in the solution of their problems of rights and obligations. Those advantages may well be outweighed by countervailing advantages, however, if superior services can be obtained at lesser cost from persons outside the chosen group. The community might possibly be better served by laymen who are skilled in technique and have a broad grasp of current law than by lawyers who by the time they have attained their skill in technique have lost their grip on current law.

■ *"New Occasions Teach New Duties"*

Times change. Three centuries ago Sir Edward Coke, in the *Case of Sutton's Hospital*, commented: "Corporations cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls." But, in the intervening three centuries, business corporations have made such progress toward the development of a soul that today in twenty-eight American jurisdictions they have the capacity, albeit through recent legislation, to make gifts to charitable, eleemosynary and educational causes. Judicial decision, which was the precursor of the legislation, long ago recognized, although in circumspect language, power in corporations to donate money.

Possibly the soul, or lack of one, of corporations is of no moment to attorneys, but power of business corporations to donate to private higher education is of lively interest to our profession. Lawyers have a two-fold interest in the theme: First, ours is a learned profession which daily attests its interest in higher education. Many of our members, for instance, serve upon the boards of trustees of private educational institutions and are, of course, concerned with their budgets. Next, all lawyers are interested in the development of the law and, accordingly, find their attention engaged when business corporations, which were previously deemed nothing more than money-makers for their stockholders, are undergoing a metamorphosis whereby they are becoming good citizens invested with power to contribute money to worthwhile causes.

"Legality of Corporate Support to Education: A Survey of Current Developments", which appears in this issue of the JOURNAL beginning on page 209, is an illuminating contribution to the thesis that business corporations should have power to donate to higher education. Seemingly, when the Internal Revenue Code made corporate contributions deductible to the extent of 5 per cent, private education, struggling against inflated costs of operation and diminishing returns upon endowment, turned to the business corporation for financial help. That juncture was the springboard which presented the problem which the article discusses. The treatise advocates that all corporations should be granted by law the power suggested by the Committee on Business Corporations: "To make donations for the public welfare or for charitable, scientific or educational purposes."

The law is a progressive science. "New occasions teach new duties; Time makes ancient good uncouth". Unless power in corporations "to make donations for the public welfare or for charitable, scientific or educational purposes" threatens the public welfare, many may find it difficult to understand why the suggested grant should not be given. Even if a corporation possesses the suggested power, it will give no money unless appropriate corporate action is taken. The power is permissive, its exercise is not compulsory. Stockholders can withhold from the corporation's officers authority to make donations. But the treatise from which this comment draws its sustenance shows that contributions to private donation are not in fact pure gifts. The contributions serve the business corporation by supporting private enterprise's great bulwark, private higher education. Unless the latter survives, private enterprise with its offspring, the business corporation, will vanish. In fact, cvilization as we know it will sink below the horizon.

Robert Porter Patterson, 1891-1952

■ One word could summarize the career of Robert Porter Patterson: selflessness. Having achieved an ambition to become a lawyer, he interrupted his professional work almost at its outset by joining the National Guard. After brief resumption of the law he served in the army overseas. Back in practice, and for once fairly started, he accepted the not overpaid office of federal judge. Ultimately a member of the Circuit Court of Appeals for the Second Circuit, and after only a year of appellate court work, he cast aside his robe to assume a position of high honor and responsibility, but with reduced compensation, in the War Department. Following five hard years spent there with great credit to himself it seemed that with the war won, too many high officials were leaving that department. So he entered upon his final public office, the highest position in the War Department. This he accepted in order to provide a continuity of leadership, and he did this at a time when he well might have preferred service of another kind had his personal wishes been the sole consideration.

The Under Secretary's office, where the greatest part of his Washington service was rendered, was a model of organization. There he was known as "the Judge". Of it he was the head in every sense. He was its architect. Its members had been selected by him. All felt the deepest loyalty to him. The office, as an office, had an *esprit de corps* comparable even to that of our proudest fighting units. As Under Secretary he was zealous in his efforts to get supplies to the men in the field, and remorseless in rejecting excuses for failure. He knew the answers himself, and whenever summoned, or often voluntarily, he would hurry before the appropriate Congressional committee or to another forum to fight vigorously for the removal of some obstacle, or to demolish the countercontentions of whosoever might challenge him. "The Judge" had a great feeling for the combat infantryman. He was constantly thinking what might be done to benefit him.

As Secretary he worked hard for the unification of command of the armed forces, an objective which his war experience convinced him was absolutely essential for the welfare of the nation and those who might be engaged in defending it. That result achieved, he resigned.

At no time and in no sense was "Bob" Patterson a one-sided man. He was equally at home in discussing ordnance, farm machinery, aviation, the rule against perpetuities, baseball, the popular songs of the 90's and early 1900's, the campaigns of the Civil War, or the English Bench and Bar, as attested by his successful suggestion of Thomas Erskine as a biographical subject. Capable of long periods of concentration or exertion without nervous strain or apparent fatigue, there never was any lapse, even momentary, in those qualities he early showed in supporting causes he thought just—incisiveness, forthrightness of expression, accuracy of vision, thoroughness of preparation, eagerness to controvert an antagonist, and the courage and determination to prevail.

In a day when integrity in public office needs encouragement, the untimely striking down of this fine recent example—with many potential years left for government service—is a grievous blow to the country. To the many who knew him and of his dedication to the general good, there remains the consolation that he did live and that he served so long.

RAYMOND S. WILKINS

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Books for Lawyers

JUSTICE ACCORDING TO LAW. *By Roscoe Pound. New Haven: Yale University Press. 1951. $2.50. Pages 98.*

To the lawyer a book by Professor Pound is always welcome. It is sure to be good reading and the result of wisdom and erudition. In this little book, constituting the John Findley Green Foundation Lectures at Westminster College, Professor Pound treats briefly of the fundamental questions to which he has devoted so long and fruitful a life.

If there be two words which have given rise to controversy and which have been used in various senses, they are certainly the words "justice" and "law". Therefore, our author consecrates his first lecture to justice: "What is Justice?", his second to law: "What Is Law?", and his third, an admirable climax to the first two, he terms "Judicial Justice".

In asking, "What Is Justice?" he naturally cites the jesting Pilate, who queries: "What is truth?", and "would not stay for an answer". Having briefly reviewed the answers made by Plato, Aristotle and many of the other great philosophers and thinkers of the past, our author gets to the great Spanish jurists of the sixteenth century and the beginning of the seventeenth century, who,

> Recognizing the facts of the political world of their time, with which the medieval juristic theory of Christendom as an empire was wholly out of accord, they conceived of individual states, and thence ultimately of individual men as equal, since states and men were able to direct themselves to conscious ends and thus their equality was a principle of justice. [Page 20].

These jurists were really the originators of international law. It is interesting to note that our author should so refer to these jurists who were in advance of Grotius, generally reputed the father of international law, and with whose works the late Dr. James Brown Scott familiarized the American lawyer.

The English utilitarians were in reality a school of legislators and their leader, Bentham, certainly had a great influence on the law and philosophic thinking of his day. His program was one of freedom and his powerful, but somewhat narrow, thinking had a great influence on our law.

In each generation the concept of justice has been of a somewhat differing character, and on the whole it may be said that down to the present day it has been broadened to include all human relationships.

> At present there is a revival of natural law, especially in the form of Neo-Scholasticism or Neo-Thomism, which would give us a theory of the end of law by logical deduction from what is given us by revelation and by intelligence, by a technique of choice guided by "the predetermined ends of the legal order which suggest the means of their own realization". [Page 28].

It is of interest to find that recently our own Supreme Court has, through one of the most modern-minded of its members, Mr. Justice Frankfurter, appealed to the concept of natural law as an element in deciding highly important constitutional questions. In his concurring opinion in the case of *Adamson* v. *California*, 332 U.S. 46, he says:

> In the history of thought, "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth.

Much earlier Mr. Justice Brown had appealed to natural law in differentiating between the various amendments to the Constitution and their importance. But when all these philosophic questions have been considered, as they are by our author, he admits that:

> At any rate, lawyers are not required to conduct a sit-down strike until philosophers agree, if they ever do, upon a theory of values or a definition of justice. [Page 29].

And he feels that:

> . . . experience has taught us how to go far toward achieving a practical task of enabling men to live together in politically organized communities in civilized society with the guidance of a working idea even if that working idea is not metaphysically or logically or ethically convincingly ideal. [Page 29].

* * *

> What we have to do in social control, and so in law, is to reconcile and adjust these [men's] desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can. Down to the present that is the more inclusive order. [Page 31].

The discussion is intriguing although perhaps too brief. It does not discuss the attempt of communism to prove that it is based upon fundamental justice, but it leaves the field open so that justice may be defined in a very general way rather than according to any absolute metaphysical concept.

In the next lecture the author asks: "What Is Law?" Philosophically as well as historically this question has been considered throughout the ages and under different terms. The author has dealt with this very complex subject, but it is not always easy reading to follow the various modern doctrinaires and their cryptic theories. As he well says:

> Today many, especially the self-styled realists, apply the term "law" to the process of determining causes and controversies according to the authoritative guides for the purpose of upholding the legal order. If we adhere to the realist doctrine that law in the second sense is mere pretence we may well keep the term for the first meaning, eliminating perhaps the idea of systematic application of force but retaining the idea of orderly application. [Page 49].

* * *

Most of the controversy over the nature of law, which was carried on

with some heat between analytical, historical, and philosophical jurists in the nineteenth century, was directed to the body of authoritative materials for the determination of controversies. The question was shifted to the legal order at the end of the century by social-philosophical jurists and in the present century the neo-realists, who denied reality of the authoritative precepts, shifted it to the nature of the judicial process. [Page 50].

It is perhaps necessary in dealing with so complicated a study as the nature of law and especially with what the various writers have considered under that heading to treat the subject in metaphysical fashion, but it makes difficult reading and one must study this text with great care in order to comprehend it.

The differences between the Anglo-American common law and the treatment of the same subjects by the civil law form the subject of a few illustrations. For instance, the theory that the owner of land owned the air space above the surface indefinitely upward gave the common law courts much less difficulty than the courts of civil law because the common law courts had determined that the public could use the stream flowing over one's property, although riparian owners owned to the middle of the stream. Thus they treated the new problem by this analogy. These practical analogies, our author says, have been very useful to the common law but much less available to the civil law, departing as it does from principle.

The author suggests that the greater part of the complaint against the administration of justice in the present century has grown from the assumption that the law has one simple meaning; "that we can treat it as an aggregate of laws, that a law is a rule and is a simple thing" (page 59).

> Law is more than an aggregate of laws. It is what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws: to restrict them by reason where the lawmaker exceeds his reason, and to develop them to the full scope of the reason where the lawmaker falls short of it. [Page 60].

Our author seems to enlarge the scientific and philosophic analysis of the nature of law as follows:

> The common law grew up as a taught tradition in the Inns of Court on the basis of adjudication in the courts. It was a taught tradition handed down from lawyer to apprentice from the seventeenth century, and is now coming to be a taught tradition of academic law schools. . . . The last of the Caesars fell three decades or more ago. The work of the jurisconsult contemporaries of the first Caesar still helps guide the administration of justice in half of the world. [Page 61].

Professor Pound concludes with his third lecture, which, to the practicing lawyers at least, is probably the most significant one—"Judicial Justice". Naturally he is a strong partisan of judicial justice as against legislative or executive justice. In American Colonial days and down to the Revolution, legislative justice was well known and the legislators, through divorce, acts of attainder, and bills of pains and penalties, took a much more active part in personal affairs than today. But this system disappeared with the Revolution and the general theory of the distribution of powers became settled law in the United States. Our author is very much in sympathy with this system, and equally opposed to the growth of legislative justice with the various abuses that affected it. As to its abolition, he says:

> . . . The provisions of modern constitutions in this respect represent more than the influence of Aristotle and of sixteenth and seventeenth-century theory. They represent universal experience of legislative justice wherever it has been tried. [Page 70].

Our own policy has grown out of the regime of Tudor and Stuart England. It bases human rights and human affairs very largely upon judicial justice, of which the author gives an admirable picture, explaining how superior it proved in practice to executive justice, although he admits that under our complicated present system of government statutes creating administrative tribunals and giving them jurisdiction and power are necessary. He says:

> I have no doubt that this change in the course of decision is perfectly sound. I am not preaching against administrative agencies in themselves . . . Administrative agencies of promoting the general welfare have come to be a necessity and have come to stay. [Page 78].

He speaks very highly of the Federal Administrative Procedure Act, but says:

> Administrative law is something new in the common-law world. Our administrative tribunals have no such taught tradition of experience developed by reason behind them as have our courts or the administrative agencies of Continental Europe. To develop and systematize such a taught tradition and fit it to our political and legal tradition of the supremacy of the law is the task of American jurists. [Page 83].

I do think there is a trend, at the present time, to enlarge and exaggerate the function of legislative investigating bodies, which may lead to very considerable injustice unless these bodies can be forced to take a more judicial view and to be subject to proper safeguards.

While the author does not categorically treat of the modern dilemma between communism and the rule of law as we understand it, he does have an interesting concluding paragraph which clearly expresses what the American lawyer generally must feel and understand.

> We must bear in mind that theories of the impossibility of justice according to law and of the disappearance of law have largely gone along with, have developed side by side with, absolute theories in politics. The two are concomitants of the movement toward absolute government which has been going on in every part of the world. The theories of law in terms of threat and force are part of a general cult of force. The real foe of absolutism is law. It presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience. [Page 91].

FREDERIC R. COUDERT

New York, New York

AMERICAN DIPLOMACY, 1900-1950. *By George F. Kennan. Chicago: The University of Chicago Press. 1951. $2.75. Pages 146.*

This compact volume written by a career diplomat of almost twenty-five years' service, a major portion of which was spent in connection with the Soviet Union, is of timely importance. In the first place, the author is widely known as the principal architect of the policy of "containment", and as the "Mister X" who first gave public expression to this strategic plan in the July, 1947, issue of *Foreign Affairs*. In the second place, Mr. Kennan has just recently been appointed to the high post of Ambassador to the U. S. S. R. Any contemporary exposition of his views with respect to diplomacy and our external relations is, for obvious reasons, of particular interest. That the author, as director of the Policy Planning Staff of the State Department from 1947 to 1950, had considerable influence in the shaping of our foreign policy is an incontrovertible fact; that his influence as ambassador to Moscow will likewise be great seems evident.

American Diplomacy poses the question: why has this country, so secure in the world of 1900, become so insecure in 1951? The author turns to the record of our foreign relations over the last fifty years in an effort to determine whether this metamorphosis resulted from the basic concepts on which our policy rested or in the manner and methods whereby our diplomacy was executed. What lessons, in other words, does the past half century of American diplomatic history hold for us in 1952?

In an attempt to answer these questions, Kennan briefly examines certain major phases of our foreign policy from the war with Spain to the end of World War II. Running through his treatment appears the thesis that there has been a "lack of an adequately stated and widely accepted theoretical foundation to underpin the conduct of our external relations". Kennan lays the blame for this at what he calls the "legalistic-moralistic approach to international problems". This approach, he states, is premised on the "belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints". It is the essence of this belief that "instead of taking the awkward conflicts of national interest and dealing with them on their merits with a view to finding the solution least unsettling to the stability of international life, it would be better to find some formal criteria of a juridical nature by which the behavior of states could be defined". The author notes that, to the American mind, it is impossible that people should have positive aspirations which they regard as legitimate (presumably such as higher living standards, outlets for overpopulation, and *lebensraum*) "more important to them than the peacefulness and orderliness of international life". Failing to grasp this essential point, American statesmanship "gropes with unfailing persistence for some institutional framework that would be capable of bringing order to international life".

Kennan then maintains that inevitably associated with these legalistic ideas are moralistic ones—"the carrying over into the affairs of states of the concepts of right and wrong, the assumption that state behavior is a fit subject for moral judgment". At first glance, one would be inclined to say that Kennan's approach to world politics is an amoral one; that he has little, if any, faith in an international juridical order; and that he apparently is a *Realpolitiker* in the cynical sense of the term. It would seem to this reviewer that if such an impression is created in the mind of the reader, it has resulted largely from the character of the book itself. *American Diplomacy* is composed of six lectures delivered by Mr. Kennan under the auspices of the Charles R. Walgreen Foundation at the University of Chicago, and like all lectures they contain the basic weaknesses of oversimplification and incompleteness. To better understand Kennan's viewpoint, his book must be read in the light of the two articles which he had previously written for *Foreign Affairs*, the one referred to above, and the second entitled "America and the Russian Future" which appeared in the April, 1951, issue. Fortunately, both these articles are conveniently contained in the appendix to the present book.

When the lectures and articles are considered together, certain basic conclusions seem to emerge. First, what Mr. Kennan appears to be objecting to in criticizing the legalistic approach is an attitude that ignores the deeper sources of international instability in its insistence on sterile legal formulas and in its naïve trust that merely by the institutionalization of international relations, all conflict will be brought to an end. Second, when Kennan speaks of the moralistic approach, what he is really condemning is not the belief in a moral order (his *Foreign Affairs* articles clearly indicate his own belief in the ultimate strength of spiritual values) but the assumption on our part of the role of moral crusaders going forth to make the world safe for democracy and to remodel it like unto ourselves. This, he believes, is wholly unrealistic and is closely identified with the concept of total war and total victory—a concept that can lead only to tragic results. He points out that alongside of our great emphasis on legal schemes and moral preachments in world affairs, we have at the same time followed inconsistent courses in our international associations, to the delectation of our enemies and to the confusion of friendly or fence straddling nations who are unable to reconcile our conduct with our pretensions. Third, the author feels that not only have our underlying premises been unsound, but the mechanics of our diplomacy have been faulty. He points at the extent to which the executive has felt itself beholden to short-term trends of public opinion, the failure to make

effective use of the principle of professionalism in the conduct of foreign policy, and to the lack of privacy, deliberateness, and the long-term approach of traditional diplomacy. Finally, what Kennan wants is apparently a return to a concept of international relations as neither a legal nor moral problem exclusively, nor one limited to the negative aspect of defense, but a problem of power relationships. Thus, while not rejecting the principle of collective security, he would return to some modified balance of power concept. As he states it, "even under a system of world law the sanction against destructive international behavior might continue to rest basically, as it has in the past, on the alliances and relationships among the great powers themselves". What, after all, is the policy of containment but a building up of sufficient strength on the part of the Western democracies to counteract or balance that of the Soviets?

If this is a correct interpretation of Kennan's views, then many of us will find ourselves in substantial agreement. If, however, his statements are to be taken as a denial that any such thing as a sound international order can be based on proper legal and moral principles which give due regard to the realities of the situation, obviously there would be room for wide disagreement. At any rate, this small volume, while its views are perhaps too frequently couched in the language of a diplomat, nevertheless, contains many incisive glances into the riddle of American diplomacy. It merits careful reading.

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JUSTICE, SCIENCE AND RELIGION AS CONTRIBUTIONS TO CIVILIZATION. *By Ruby R. Vale. San Francisco: C. W. Taylor, Jr. 1951. $3.50. Page xxii, 198.*

The Vale Pennsylvania Digest commonly called "Vale", a monumental work, is an essential tool for the judges and lawyers of Pennsylvania. The office of the Philadelphia lawyer could not operate efficiently without it. It is on these helpful volumes that the name of Ruby R. Vale comes daily before the eyes of the Bench and Bar of the Commonwealth. Certainly no other legal work is used more extensively or with greater gratitude. We therefore associate the name "Vale" with very practical, very concise statements of law. But Mr. Vale's writings on philosophical subjects are not so well known, probably because they are more profound and demand thoughtful, contemplative reading. In addition to his erudition in the field of law, Mr. Vale displays an enviable knowledge of philosophy, science, history, religion, literature, economics and world affairs, all of which he correlates and binds together in a scholarly manner.

The fifth volume of a series entitled "Some Foundations of Society and Contributions to Civilization", has been published recently. Its title, *"Justice, Science and Religion as Contributions to Civilization"*, gives some idea of its tremendous scope. It brings together the four previous volumes entitled respectively, *Understanding, Purpose, Conciliation, and Justice.* The entire series covers a total of 1485 pages and each volume follows the previous one in pagination. The current volume runs from pages 1287 to 1485, or 198 pages. This is a very short book in which to encompass the vastness of the ideas expressed. It is divided into forty-seven brief chapters, all adequately titled, and this helps to make it easily read. An excellent index conveniently includes all five volumes of the series and the wide range of subjects covered is of itself amazing. Chromosomes and cromation; nominalism, realism and conceptualism; the transmutation of inorganic energy into vital function; Einstein, Mary Baker Eddy; conclusions on profit sharing; labor unions and industry, are a few of the hundreds of subjects indexed.

Mr. Vale starts by assuming "as a concept of science and jurisprudence that government and justice under law are determined by cosmic forces and adapted to the uses of man by the conscience of his creative mind". Much stress is laid on the natural laws of polarity and harmony, the universal interaction of all energies in time, space and human relations, applied in mental as well as physical fields, the purposive energies of nature and the indivisibility of energy and mind. Another assumption in one form or another runs through the book: ". . . the problem of the universes of matter and mind, and all their reactions and relations well may be said to be, the maintenance in equilibrium of an energy process or of its opposite forces in antithesis". Mr. Vale's concept of the relation of opposing forces as universally applied covers such a vast field and is at the same time so concentrated that it is impossible to cover it adequately in a book review. However, from these postulates, the author ingeniously develops many practical ideas for human betterment. He feels that centralization of government is placing free people in peril because taxation for public welfare may be used for the revolutionary purpose of redistributing the wealth of the nation; that it is constitutionally possible to weaken and finally abolish private property, making Marxism and national bankruptcy almost imminent. He offers as one of the ways to preserve freedom and justice under democratic forms a concrete plan for profit sharing that would be neither philanthropic nor paternalistic, but, by a system of deferred distribution, would insure the worker against privations caused by unemployment and old age.

Mr. Vale believes that universal justice alone can stay the chaos of atomic warfare, but apparently is not very optimistic as to its immediate attainment, because he also expresses the hope that "atomic fission's destruction of the aggressive outlaw soon will lengthen the eras of peace and so lessen mankind's need for wars for its periodic outlet of those human energies that destroy injustices, remedy wrongs and lead civilization always to higher ways of life and

finally, to more just and humane relations". He urges the outlawing of Marxism, to be enforced by a world tribunal of allied nations and the use of "atomic fission". His championship of the use of atomic weapons as essential to preserve order and subdue the "outlaw nation" will not meet with universal approval and indeed this is not a comforting idea to those who abhor war and hope that a permanent peace is possible within the foreseeable future. But it must be admitted that history gives little encouragement for what may be wishful thinking. On the other hand there can be no assurance that atomic weapons will be used only in the exercise of police power unless their use is controlled by a system of universal law.

Mr. Vale's book will not be widely read and probably no one is more aware of this than Mr. Vale himself. The profundity of the content will not attract the average reader, but it will offer a distinct challenge to the philosopher and others with a concept of universal energy who sincerely are attempting to relate the cosmos to mundane affairs. The highest tribute should be paid to Mr. Vale for the work he has done on this series from such purely noble and unselfish motives.

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PRINCIPLES OF BUSINESS AND THE FEDERAL LAW. *By Franklin H. Cook. New York: The Macmillan Company. 1951. $5.50. Pages 592.*

The author, associate professor Franklin H. Cook of the Department of Economics and Commerce of Pennsylvania State College, states that this book is a combination text and casebook stressing the important legal and economic principles that affect business in its relation with government. The publisher says that this book gives the information necessary to enable the student when he enters private business or government employment to guide his action in accord with the fundamental federal law, to understand its historical development and to forecast its probable future; that the book employs a legal-economic (functional) approach to the principles and development of federal constitutional and statutory law applicable to business —simplified for the undergraduate student in economic courses on government and business, and in political science courses covering constitutional law, public utilities, labor, securities, taxation, transportation and competition and monopoly; and that this is a new text which teaches a middle way between free enterprise and collectivism but this statement is modified by the later statement that the book presents the law as it is written and the Court's interpretation of the law and the author has not interjected his own interpretation.

These statements are well borne out if we keep in mind the limitations of 592 pages and the above qualification that it is *simplified* for the undergraduate student.

The book is divided into two main sections, both in one volume. Part I discusses the application of constitutional clauses to business and labor practices. In so doing, it emphasizes the federal affirmative powers of taxation and control over commerce and the limitations on those powers as found in the due process clause. It also considers the state authority of eminent domain, taxation and police powers with regard to the limitations imposed on them by the impairment, equal protection, and privileges and immunities clauses, and the due process clause. The discussion of business functions and economic policy follows the constitutional framework in considering the regulation of public utilities, competitive business in respect to prices, the amenability of business generally to state and federal taxation, and burdensome legislation imposed by other states. Federal authority over the mails, press and radio is summarized. Labor rights regarding picketing, collective bargaining, striking, anti-injunction legislation, minimum wage and maximum hour legislation are outlined.

Part II surveys and analyzes specific federal legislation in the fields of restraint upon business such as the antitrust laws, unfair trade practices legislation, labor legislation, securities regulation and transportation.

The distinction in the distribution and exercise of powers between the federal and state authorities is discussed throughout as the problem arises with each new topic.

The arrangement of material should aid undergraduates: a complete outline precedes each chapter, a summary appears at the end of each chapter, and case problems and references are included. Legal principles are illustrated by United States Supreme Court cases. Current materials including some of the recent acts are used.

I suppose in a review of a book for the AMERICAN BAR ASSOCIATION JOURNAL something should be said as to the value of the book to practicing lawyers. A specialist will find here little of interest in his particular field because of space limitations. For example, one of the longest discussions is of antitrust law. This excellent general discussion devotes forty pages to the Sherman Act, twenty-eight pages to the Clayton Act and Robinson-Patman Act, eighteen pages to patents and copyrights, eighteen pages to the Federal Trade Commission Act and to unfair trade practices, and sixteen pages to the Anti-Injunction Act, a total of one hundred twenty pages. Similarly, eleven pages are devoted to the Public Utility Holding Company Act, ten pages to the Securities Act, thirteen pages to the Securities Exchange Act and twenty-one pages to the Trust Indenture Act of 1939, the Investment Act of 1940, and the Investment Advisers Act of 1940. It is not unusual for single magazine articles to run almost as long while a single symposium may considerably exceed these discussions in length and certainly in specificity.

Yet outside of one or two fields, most practicing lawyers may be considered general practitioners with little more knowledge than the

undergraduate for whom the book is written. In these fields lawyers will find this book a valuable addition to their library as they will find here a general statement as to the law, its origin, development, and present status. Covering such a wide range, this task is remarkably well done.

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FEDERAL FOOD, DRUG, AND COSMETIC ACT. JUDICIAL AND ADMINISTRATIVE RECORD. 1949-1950. *By Vincent A. Kleinfeld and Charles Wesley Dunn. (Food Law Institute Series). Chicago: Commerce Clearing House, Inc. 1951. $10.25. Pages 543.*

Supplementing an earlier volume by the same authors, *Federal Food, Drug, and Cosmetic Act, Judicial and Administrative Record, 1938-1949* (1949), reviewed in the JOURNAL two years ago,[1] the present volume brings the account up to date. The most significant comparison to be made between the two volumes is that the second, covering little more than the years 1949-1950, requires more than half the pages needed to cover the eleven years to which the first volume was devoted. Increasing litigation as well as heightened administrative activity under the Federal Food, Drug, and Cosmetic Act seems to be the explanation.

Like the previous volume, the Foreword explains, Mr. Dunn's contribution lay in the planning and Mr. Kleinfeld's in the execution. Neither volume would ever have appeared, it must be added, without Mr. Dunn's tireless efforts as President of the Food Law Institute to obtain the necessary financial support from the industry. Mr. Kleinfeld's years of experience in the Department of Justice, trying cases under the 1938 Act, as well as his current assignment as Chief Counsel for the House Committee To Investigate the Use of Chemicals in Food Products, qualify him for the task he has carried out so faithfully.

The first section of the book contains twenty-four of the most significant judicial opinions, principally from the United States Supreme Court, interpreting the Food and Drug Act of 1906, the predecessor of the Federal Food, Drug, and Cosmetic Act of 1938. While nineteen of these opinions are found also in Gates, *Decisions of Courts in Cases under the Federal Food and Drug Act* (1934), the rest appeared after Gates' book was published and in any case it is now out of print. In part, therefore, this meets the criticism[2] of the previous Kleinfeld-Dunn book that it failed to fill the gap between the Gates' compilation of cases under the old act and the cases arising under the new act.

Judicial opinions, as well as notices of judgment, consisting of charges to juries and findings of fact not readily available in published form, all pertaining to the Federal Food, Drug, and Cosmetic Act of 1938, make up the next section, bringing up through 1950 the collection in the earlier volume.

The Statements of General Policy or Interpretation issued in 1949-1950 follow, succeeded by over one hundred pages of definitions and standards for foods, consisting of all the standards promulgated under the 1938 Act. Six new forms for use in food, drug and cosmetic cases in the federal district courts supplement the collection in the previous Kleinfeld-Dunn book.

Another useful feature of the earlier volume which has been brought up to date is the table of references from law to interpretation, which lists under the appropriate section of the 1938 Act references to all materials in the 1949-1950 volume. The 1938 Act is reprinted together with the regulations promulgated under the various sections of the Act, the 1949 amendments to the import provisions of the Act and the constitutionally controversial Oleomargarine Act.

A cumulative table of cases covers the cases published in both the 1938-1949 volume and the 1949-1950 volume. The comprehensive index is in pleasant contrast to the meager indices so often an obstacle to the use of legal books, especially by laymen.

The volume conforms to the sparkling format prepared for the Food Law Institute Series, of which it forms a part. Successive volumes over the coming year, it is to be hoped, will continue the record for the use of attorneys, the courts and students.

WILLIAM TUCKER DEAN, JR.
New York University
New York City

MANUAL CONCERNING LEGAL DOCUMENTS FOR THE LAW STENOGRAPHER WITH INSTRUCTIONS AND SAMPLE FORMS. *By Evangeline Sletwold. Chicago: Burdette Smith Company. 1950. $6.00. Pages 108.*

Eugene C. Gerhart, in his report prepared for the Survey of the Legal Profession entitled "How Lawyers Conduct Their Practice", published in the October, 1951, AMERICAN BAR ASSOCIATION JOURNAL, devoted one section to secretarial assistance. According to the Survey questionnaire, lawyers rely upon an imposing list of qualities in a secretary in addition to her ability to type and transcribe dictation.

This comprehensive manual, by Miss Evangeline Sletwold, is a prime aid to the legal secretary where, at a moment's notice, she can locate the forms for setting up briefs, pleadings, corporation minutes, wills and other legal documents, thus avoiding constant interruptive quizzing of a busy lawyer.

Miss Sletwold, a legal secretary of many years' experience and presently assistant to the senior partner of one of the larger Chicago law firms, has compressed into this manual the wealth of her knowledge in this field. Here will be found a mass of practical minutiae on the kind of paper to use, margin requirements, spacing, numbering, punctuation, inscribing bluebacks, as well as actual examples of pleadings in the state and federal courts. But the author, who in her spare time is the originator of and instructor in a legal sten-

1. Dean, book review, 36 *A.B.A.J.* 922 (1950).
2. *Ibid.*, 923.

ographic course at Gregg College, has not stopped with mere forms. As the Survey report states, "brains and intelligence, interest in business, are among the qualities sought for in a secretarial assistant". And so accompanying the varied list of forms is a brief explanation of the purpose of each, and, if it is part of a lawsuit, the order in which it makes its appearance on the agenda.

The final chapter entitled "Helps" runs the gamut from such pertinent suggestions as the use of chalk in minimizing erasures to the meaning of the most common legal phrases and the manner in which they are abbreviated in legal writing. Especially is Miss Sletwold to be congratulated on her clear and concise style and excellent detailed index.

As the author is most familiar with Illinois practice, the pleading forms now appearing in the manual tie in closely with the procedure of that state. However, she has been astute enough to have her book published in loose-leaf form and appropriate documents used in other states can be easily added or substituted for these.

While this excellent work would be extremely useful to any lawyer whose secretary is the veritable paragon described in the Survey report, it could be considered almost a necessity for the young advocate who, while the ink is drying on his license, very often not only pleads his client's case but types it as well.

KATHARINE D. AGAR

Chicago, Illinois

THE DECLARATION OF INDEPENDENCE: AND WHAT IT MEANS TODAY. *By Edward Dumbauld. Norman, Oklahoma: The University of Oklahoma Press. 1950. $3.00 Pages 156.*

This little book is an excellent treatise on the Declaration of Independence and is an interesting explanation for the reason for the phraseology of various parts of that document.

There is a short chapter on the background of the adoption of the Declaration, followed by another short chapter on the different texts extant.

The main body of the book is divided into eight chapters: "The Preamble", "The American Philosophy of Government", "The Charges Against the King", "Abuse of Executive Power", "Obnoxious Acts of Pretended Legislation", "Deeds of Violence and Cruelty", "Vain Appeals to the British King and People" and "Assumption of Status of Independent States".

There are four appendices: the Dunlap Broadside of the Declaration, Jefferson's Preamble to the Virginia Constitution, the English Bill of Rights and the Virginia Bill of Rights.

Mr. Dumbauld points out that the American theory of government, as exemplified in the Declaration of Independence, was based upon the tenets of natural law, glorified the dignity of the individual man and was built upon the English Bill of Rights presented by the English Parliament to William and Mary in 1689. The American Colonists considered their only connection with the British government to be the Crown. Consequently they stated that no rights were created by government (contrary to the theory of the positive law advocates) but that government was created merely to secure rights that were already inherent in the people. They insisted that government, any just government, was always the servant and not the master of the people. They contended that the British Parliament had no right to legislate for the American Colonies, especially in matters of taxation.

The author points out the frequent error of the assumption of the positivists that the Declaration was drawn merely for the purpose of enthroning in power the large property owners among the Colonists. After all, if this view of the positivists is correct, it was certainly not the view of the Colonists themselves, since it is a matter of history that most of the Tories in the Colonies were people of property and wealth. Few of the "rabble" were Tories.

In his discussion of the various parts of the Declaration, Mr. Dumbauld mentions facts apparently largely forgotten today: that the individuals who had the most to do with the framing of the Declaration (as was also true of the framing of the Constitution) knew a great deal about government and about the history of government throughout recorded time; that they did not intend to create a strong centralized government for the reason that they distrusted all government; that most of the signers of the Declaration agreed with Jefferson that history was merely a record of bad government. The author declares that our present Supreme Court is adopting an unjustifiable interpretation of the Constitution by reading into the Fourteenth Amendment (addressed only to the states) the provisions of the first Ten Amendments which are directed at the power of the Federal Government.

This is an excellent little book which can be read in an evening. It gives a new insight into the Declaration which, through its noble language, brings a warm glow again to the hearts of all free men.

PHIL STONE

Oxford, Mississippi

ROMAN LAW. *An Historical Introduction. By Hans Julius Wolff. Norman, Oklahoma: University of Oklahoma Press. 1951. $3.75. Pages 260.*

The United States and other countries with cultural ties to England are much indebted to that country for their common law jurisprudence as most Americans know. But just how much the rest of the countries in the West owe to the civilization of Rome for their various legal systems is perhaps not always so well appreciated. The author of this book on Roman law is anxious to enlighten the practical lawyer as well as general reader on the matter. In his mind, knowledge of the Roman law is of great importance to practicing lawyers in the United States. He states: "We may thus say that the very fact that Anglo-American law was far

less subject to Roman influences than was Civil law, and that, consequently, Romanist concepts and doctrines are not immediately familiar to the common lawyer, makes a foundation in Roman law all the more imperative for him if he wishes to find a common basis of discussion with the European or South American lawyer —whether this discussion aims to establish new legal principles in private or public international relations, or deals with problems of practice involving foreign law."

The author, after establishing with a number of arguments, the importance of a foundation in Roman law, occupies the major portion of this book with a coverage of most of its aspects. He dwells chiefly on the law of Rome and the Roman Empire from the first codification called the "Twelve Tables" to the last, the codifying legislation of Emperor Justinian, known as "Corpus Iuris Civilis". However, it is only in passing that the substance of the law is discussed. Since this is but an introductory text there is hardly space for the doctrines or concepts of the Roman law. There is in this book, nevertheless, a wealth of material of a historical nature. There is much about the development of the law in relation to the political changes in the one thousand years, more or less, of Roman history, and the sources from which the Roman law was derived. This work, in short is a fine introductory text for the serious reader. An ample bibliographical note will add much to its usefulness for students of Roman law.

In addition to the treatment of the law of Rome and the Roman Empire, there is another interesting part to this book, namely, that concerning Roman law in medieval and modern times. The author traces the Roman law in the different forms it assumes throughout the centuries and in various countries up to the present. By so doing, he not only relates his subject to current times and interests, but also provides a well rounded historical introduction to the Roman law.

FRANKLIN P. MICHELS
Chicago, Illinois

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1952 Annual Meeting and ending at the adjournment of the 1955 Annual Meeting:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

An election will be held in the State of Georgia to fill the vacancy for the term expiring at the adjournment of the 1952 Annual Meeting.

An election will be held in the State of New Mexico to fill the vacancy for the term expiring at the adjournment of the 1953 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1952 must be filed with the Board of Elections not later than April 18, 1952. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt February 29) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 25, 1952.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., April 18, 1952.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve

Review of Recent Supreme Court Decisions

George Rossman

Editor-in-Charge

CONSTITUTIONAL LAW

Petitioner Held Entitled To Show Denial of Right of Counsel in State Hearing of Habeas Corpus Petition

■ *Palmer* v. *Ashe*, 342 U. S. 134, 96 L. ed. Adv. Ops. 130, 72 S. Ct. 191, 20 U. S. Law Week 4048. (No. 38, decided December 11, 1951.)

Petitioner, a prisoner in a Pennsylvania penitentiary, was serving the second of two sentences imposed after pleas of guilty to state offenses. This was a habeas corpus proceeding filed in a Pennsylvania court which alleged that the pleas of guilty had been entered without benefit of counsel and that special circumstances existed that deprived him of opportunity and capacity fairly to defend himself. He alleged that he had been convicted of robbery, but had been deceived by the police and had thought that he was pleading guilty only to the lesser crime of breaking and entering; that, when sentenced, he was a "young, irresponsible boy, having spent several years in Polk [a state institution] (because he was mentally abnormal) . . . "; and that he had such low mental capacity that it was impossible for him to protect himself in court. The state court denied the writ, holding that the record failed to show probable cause for his discharge. The state superior court affirmed and the Pennsylvania Supreme Court refused to grant an appeal.

The Supreme Court of the United States reversed and remanded, speaking through Mr. Justice BLACK. He declared that the allegations set forth in the petition would, if proved, "present compelling reasons why petitioner desperately needed legal counsel and services". In reply to the contention that the allegations were refuted by the trial record, Mr. Justice BLACK replied that, while this was so with respect to some of them, the record did not "even inferentially deny petitioner's charges that the officers deceived him, nor does the record show an understanding plea of guilty, unless by a resort to speculation and surmise. The right to counsel is too valuable in our system to dilute it by such untrustworthy reasoning."

Joined by the CHIEF JUSTICE, Mr. JUSTICE REED and Mr. Justice JACKSON, Mr. Justice MINTON dissented on the ground that the long interval between the time petitioner was convicted and the time he raised his charges of error made it an allowable judgment for the state courts to conclude that the petitioner's allegations were improbable.

The case was argued by Louis B. Schwartz for the petitioner, and by Leonard H. Levenson for the respondent.

CONSTITUTIONAL LAW

Use of Stomach Pump by State Officers To Obtain Evidence Held To Violate Due Process Clause of Fourteenth Amendment

■ *Rochin* v. *California*, 342 U. S. 165, 96 L. ed. Adv. Ops. 154, 72 S. Ct. 205, 20 U. S. Law Week 4057. (No. 83, decided January 2, 1952.)

Petitioner Rochin was convicted in a California court of the illegal possession of morphine following his arrest by police officers who entered his home without a warrant and forced their way into his bedroom. The chief evidence against him was two capsules containing morphine which petitioner had swallowed when the officers entered his room. He was arrested and taken to a hospital where the capsules were removed from his stomach with a stomach pump. The conviction was sustained by the District Court of Appeal of California despite its finding that the police had been guilty of breaking and entering and "unlawfully assaulting, battering, torturing and falsely imprisoning the defendant. . . ." The California Supreme Court denied a petition for a hearing without opinion, two justices dissenting.

Mr. Justice FRANKFURTER reversed for the United States Supreme Court. Holding that the treatment of the petitioner was a violation of the due process clause of the Fourteenth Amendment, he declared that "illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents" were "methods too close to the rack and the screw to permit of constitutional differentiation". He rejected any attempt to draw a distinction between real and verbal evidence, saying that "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."

Mr. Justice BLACK wrote a concurring opinion in which he said that he would rest the reversal upon the Fifth Amendment's prohibition against self-incrimination.

Mr. Justice DOUGLAS wrote a concurring opinion in which he pointed out that the capsules would be admissible as evidence in a majority of state courts. Like Mr. Justice BLACK,

Reviews in this issue by Rowland L. Young.

he declared that he would hold the Fifth Amendment binding upon the states.

The case was argued by Dolly Lee Butler and A. L. Wirin for the petitioner, and by Howard S. Goldin for the State of California.

DECLARATORY JUDGMENTS

Federal Declaratory Judgments Act Grants Lower Federal Courts Wide Discretion—Manufacturer's Suit for Declaratory Judgment Holding Patents Invalid Held Not To Be Entitled to Injunction Restraining Prosecution of Infringement Suit Begun Previously in Another Forum

■ *Kerotest Manufacturing Company* v. *C-O-Two Fire Equipment Company*, 342 U. S. 180, 96 L. ed. Adv. Ops. 163, 72 S. Ct. 219, 20 U. S. Law Week 4063. (No. 180, decided January 2, 1952.)

The C-O-Two Fire Equipment Company, a Delaware corporation which owns the two patents involved in this case, began an infringement suit in a federal district court in Illinois against the Acme Equipment Company on January 17, 1950. On March 9, 1950, Kerotest filed this action in a federal district court in Delaware, seeking a declaratory judgment that the C-O-Two patents are invalid and that the devices that it manufactures and sells to Acme do not infringe the C-O-Two patents. Kerotest is a Pennsylvania corporation, but is subject to service in Illinois. C-O-Two joined Kerotest as a defendant in the Illinois action. On motion of C-O-Two, the Delaware court stayed the action filed with it for ninety days and refused to grant Kerotest an injunction prohibiting prosecution of the Illinois proceeding. On appeal, the Court of Appeals for the Third Circuit affirmed. After the ninety-day stay expired, the Delaware court enjoined C-O-Two from proceeding in Illinois and denied a further stay of the action pending before it. The Court of Appeals for the Third Circuit reversed on the ground that Acme could not be made a party in the Delaware action, whereas all parties could be joined in Illinois and that the result of that suit would bind all parties.

The Supreme Court affirmed in an opinion by Mr. Justice FRANKFURTER. Calling attention to the fact that an "ample degree" of discretion is left to the lower federal courts under the Federal Declaratory Judgments Act, he noted that the Court of Appeals had twice concluded that all interests would best be served by prosecution of a single suit in Illinois: "Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours." He refused to entertain the argument that the result would encourage owners of weak patents to avoid a real test of the validity of their patents by bringing suits in forums inconvenient to the manufacturer or selected because of greater hospitality to patents. "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure" he said. He found that the lower courts' discretion was broad enough to protect a manufacturer from such harassment.

The CHIEF JUSTICE and Mr. Justice BLACK dissented without opinion.

The case was argued by Walter J. Blenko for the petitioner, and by R. Morton Adams for the respondent.

MONOPOLIES

Newspaper's Refusal To Carry Advertising If Advertiser Uses Local Radio Station Held To Be Restraint on Interstate Commerce, Enjoinable Under Section 4 of Sherman Act

■ *Lorain Journal Company* v. *United States*, 342 U. S. 143, 96 L. ed. Adv. Ops. 121, 72 S. Ct. 181, 20 U. S. Law Week 4043. (No. 26, decided December 11, 1951.)

This was a civil action instituted by the United States against the Lorain Journal Company and its officers as individuals for alleged violations of Sections 1 and 2 of the Sherman Act. The complaint accused the defendants, publishers of a daily newspaper at Lorain, Ohio, of conspiring to restrain interstate commerce and to monopolize such commerce by refusing to accept advertisements for their paper from any Lorain County advertiser who advertised over the facilities of WEOL, a local radio station. The district court found that the *Lorain Journal* reached 99 per cent of the families in the City of Lorain, that it was the only daily paper in the city, and that advertising in the *Journal* was essential for the promotion of sales in the county. It found that defendants' actions in refusing to accept advertisements from advertisers who sold their products over WEOL was "bold, relentless, and predatory commercial behavior" that accomplished its purpose of causing merchants in the area to abandon their advertising over the radio station. The court issued an injunction forbidding defendants to continue their boycott of the station (see 36 A.B.A.J. 936; November, 1950.)

The United States Supreme Court affirmed on appeal under the Expediting Act of 1903, 32 Stat. 823, 15 U.S.C. § 29. Mr. Justice BURTON, speaking for the Court, held that defendants' conduct was an attempt to monopolize interstate commerce by eliminating WEOL, thus restoring the *Journal* to its former position of virtual monopoly of mass dissemination of all news and advertising, interstate and national, as well as local in the area. He had little trouble in finding defendants' business to be interstate commerce, declaring that "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is part of interstate commerce."

In affirming the District Court's finding that the publishers' actions were an attempt to monopolize within the meaning of Section 2 of the Sherman Act, Mr. Justice BURTON relied upon the *Journal's* substantial monopoly of news and advertising in Lorain County prior to 1948, when WEOL began broadcasting, and the

fact that the station's greatest potential source of income was local Lorain advertising, which defendants' conduct interfered with. Without that advertising, the existence of the station was threatened, Mr. Justice BURTON said. He rejected defendants' claimed right to select its customers and to refuse to accept advertisements from whomever it pleased, declaring that that right is not absolute and may not be exercised as a "purposeful means of monopolizing interstate commerce" under the Sherman Act. He found no violation of freedom of the press in the injunction: "The injunction applies to a publisher what the law applies to others. The Publishers may not accept or deny advertisements in an 'attempt to monopolize . . . any part of the trade or commerce among the Several states.' . . . Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others."

Mr. Justice CLARK and Mr. Justice MINTON took no part in the consideration or decision of the case.

The case was argued by William E. Leahy for the Lorain Journal Company, and by Solicitor General Philip B. Perlman for the United States.

SEAMEN

Verdict Awarding Damages for Accidental Death Under Jones Act Upset on Ground That Decedent Was Not a "Seaman" When Engaged in Work of Reconditioning Vessels

■ *Desper* v. *Starved Rock Ferry Company*, 342 U. S. 187, 96 L. ed. Adv. Ops. 150, 72 S. Ct. 216, 20 U.S. Law Week 4054. (No. 231, decided January 2, 1952.)

This was a suit under the Jones Act, 38 Stat. 1185, 41 Stat. 1007, 46 U. S. C. § 688, to recover damages for the death of petitioner's son from injuries sustained during the course of his employment by the Starved Rock Ferry Company. Decedent had been employed to operate a sightseeing motorboat on the Illinois River during the summer months. In winter, the boats were blocked up on shore; in the fall and spring, Desper was employed to remove the boats from the water, block them up and recondition them for the next season. His employment ended in mid-December and he was re-employed in mid-March. The accident that caused his death occurred during the spring before the season opened, while he was engaged in the work of repairing and reconditioning the boats. Petitioner won a verdict in the federal district court, but the Court of Appeals for the Seventh Circuit reversed. In the Supreme Court on writ of certiorari, petitioner contended that Desper was a "seaman" within the meaning of the Act.

Speaking for the Court, Mr. Justice JACKSON affirmed the Court of Appeals. He rejected a contention that a 1939 amendment to the Federal Employers' Liability Act extended the scope of the word "seaman" as used in the Jones Act to include those whose work "substantially affects" navigation, and found that that amendment merely redefined the scope of the word "employee" to include certain persons not theretofore covered because they were not directly engaged in interstate or foreign commerce. "It does not extend the meaning of 'seaman' in the Jones Act to include one who was not a 'seaman' before" he said.

He concluded that Desper was not a "seaman" within the meaning of the Act, stressing the facts that the work in which he was engaged at the time of his death was not usually done by seamen and that none of respondents' vessels were engaged in navigation at the time of the accident. The question of the applicability of the Longshoremen's and Harbor Workmen's Compensation Act was not raised and was not decided by the Court.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissented.

The case was argued by Joseph D. Ryan for the petitioner, and by Charles T. Shanner for the respondent.

UNITED STATES

Award of Gratuity Pay for Overtime Work Performed by *Per Diem* Federal Employee Upheld

■ *United States* v. *Kelly*, 342 U. S. 193, 96 L. ed. Adv. Ops. 143, 72 S. Ct. 213, 20 U. S. Law Week 4053. (No. 209, decided January 2, 1952.)

Kelly was employed by the Government Printing Office during the war under a wage agreement which read as follows: "*Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive order shall be paid at the day rate plus 50 per cent for all time actually employed in addition to their gratuity pay for the holiday as provided by law. . . ." In this case, the Government sought review of a judgment of the Court of Claims awarding Kelly gratuity pay for work performed on certain holidays. The Government argued that a 1938 Resolution of Congress precluded award of the gratuity pay. That Resolution provided that whenever *per diem* employees were "relieved or prevented from working solely because of the occurrence of" holidays, "they shall receive the same pay for such days as for other days on which an ordinary day's work is performed".

Speaking for the Supreme Court, Mr. Justice MINTON affirmed the decision of the Court of Claims, declaring that the Resolution merely established the "holidays provided by law" mentioned in the wage agreement. "Merely because the Resolution itself may not award gratuity pay for holidays worked is no ground for vitiating a wage agreement which does" he declared.

Mr. Justice REED, joined by the CHIEF JUSTICE and Mr. Justice BLACK, wrote a short dissenting opinion, pointing out that the administrative interpretation of the Comptroller General had consistently been that respondents were not entitled to gratuity pay and that the journeymen printers had acquiesced in that interpretation for eight years after 1938.

The case was argued by Saul R.

Gamar for the petitioner, and by Henry J. Fox for the respondent.

VETERANS

Provision for Restitution of Excessive Prices Charged for Homes Held Not To Survive Repeal of Veterans' Emergency Housing Act of 1946

■ *United States* v. *Fortier,* 342 U. S. 160, 96 L. ed. Adv. Ops. 136, 72 S. Ct. 189, 20 U. S. Law Week 4051. (No. 14, decided December 11, 1951.)

This was an action brought by the United States under the Veterans Emergency Housing Act of 1946 to compel restitution of allegedly excessive prices charged by respondents in the sale of two houses. Respondents had stipulated maximum sales prices for the houses in securing permission to build under Priorities Regulation 33. Statutory authority for that regulation was repealed before sale of the houses. The Government contended that the maximum prices stipulated under the Priorities Regulation were a condition of the construction authorization and priorities' assistance that survived repeal. The district court entered judgment for respondents and the Court of Appeals for the First Circuit affirmed.

On writ of certiorari, the Supreme Court affirmed in a *per curiam* opinion in which the Court said that the 1947 Act repealing the Veterans' Emergency Housing Act "provided for veterans' preferences in the sale and rental of housing and for rent ceilings on certain accommodations constructed with the assistance of priorities secured under the 1946 Act. Congress addressed itself to the problem of veterans' housing, but refrained from imposing any price restrictions on the sale of houses. Congress having indicated a contrary purpose, we will not impose such restrictions by implication."

Mr. Justice MINTON took no part in the consideration or decision of the case.

The case was argued by Oscar H. Davis for the United States, and by Stanley M. Brown for respondents.

WORKMEN'S COMPENSATION

One-Year Limitations Period Established by Longshoremen's and Harbor Workers' Act Begins To Run from Date of Injury Rather Than from Date of Disability

■ *Pillsbury* v. *United Engineering Company,* 342 U. S. 197, 96 L. ed. Adv. Ops. 146, 72 S. Ct. 223, 20 U. S. Law Week 4045. (No. 299, decided January 2, 1952.)

The Longshoremen's and Harbor Workers' Compensation Act provides that "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury. . . ." The claims at issue in this case were filed from eighteen to twenty-four months after the date of the injuries to the workmen, but were held to be timely by the Deputy Commissioner because they had been filed within one year after the claimants had become disabled because of their injuries. The District Court vacated the awards and the Court of Appeals affirmed. Petitioners argued that, since the statute did not allow compensation for the first seven days of disability, an employee would be barred from filing his claim before his right to file arose because he might fail to accrue seven days of disability within one year after the injury.

Mr. Justice MINTON affirmed the judgments of the courts below, speaking for the Supreme Court. His opinion drew a distinction between the right to recover for disability and the right to file a claim. He held that the proper interpretation of the statute did not prohibit the filing of a claim before accrual of seven days' disability and found that the practice of the Deputy Commissioner was to permit such filing to avoid the running of the limitations period.

Mr. Justice BURTON wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice DOUGLAS joined. The dissenting Justices thought that the Court's computation of the limitations period was opposed to the beneficial purpose of the statute and was not called for or justified by the statutory language.

The case was argued by Samuel D. Slade for the petitioners, and by Edward R. Kay for the respondents.

Patent Law: The British Trend

(Continued from page 218)

tical application of the law but also in insistence by counsel on the availability of really independent evidence from practical men actually engaged in the relevant industry. Judges have now begun to feel that patent litigation is no longer the highly artificial game it used to be, but simply involves the trial of issues which are rather more difficult than usual, requiring particular care and attention.

The limited study I have been able to make of recent cases in the United States suggests that patent practitioners in your courts are equally aware of the need to secure a new judicial climate and, as a friendly onlooker from across the Atlantic, I venture to suggest that the outlook is perhaps not so black as it may appear. After all, the kind of approach I have tried to outline already appears clearly in some of the important dissenting opinions of the Supreme Court, and history has shown that the minority opinion of today is often the commonplace of the unanimous decision of tomorrow.

It is surely not too optimistic, and I sincerely trust it will not be considered impertinent, to express the hope that the views of such great men as Judge Learned Hand running as they do on the same lines as those of Lord Moulton and Lord Tomlin, will as time goes on come to exert the strong persuasive influence on the patent law of the United States to which their inherent soundness and common sense entitle them.

Courts, Departments and Agencies

George Rossman · EDITOR-IN-CHARGE **Maxine M. Sprung** · ASSISTANT

Attorney and Client . . . unauthorized practice of law . . . laymen may be held in contempt of court for unlawful practice of law since statute making such unlawful practice a misdemeanor is not the sole remedy.

■ *In re Baker and Bieber,* N. J. Supreme Ct., December 26, 1951, Vanderbilt, Ch. J. (Digested in 20 U.S. Law Week 2269, January 2, 1952).

In this action the Court held two laymen in contempt of court for the unauthorized practice of law. Baker, a deputy surrogate, and Bieber, a title searcher, prepared and executed a will for an 80-year-old farmer which named them as executors and residuary legatees and gave them full control over the farmer's property in the event he became incompetent. When the farmer asked for the return of the will it was surrendered only after repeated requests and a delay of two months.

From these facts the Court concluded that the two men were conspirators in a fraudulent and illegal adventure. Baker, in defense of himself, argued that he did not prepare the papers and that the Court has no authority to punish by contempt the unauthorized practice of law, since by New Jersey statute such unlawful practice is a misdemeanor, that being the sole remedy. In reply the Court stated that while Baker did not actually draw the papers, he did participate in their preparation and the discussions leading to their final execution. Furthermore, the Court remarked that laymen may be punished for contempt even though the same conduct is made a crime, just as lawyers may be disciplined by the court for acts which are crimes. Chief Justice Vanderbilt stated: "But whether inherent or express, these powers over the admission and discipline of members of the bar would be meaningless and futile if laymen might practice law with impunity. The damage which would overtake the public from permitting such unauthorized practice of the law is strikingly illustrated in the present case. . . . The power to control admissions and to discipline the members of the bar necessarily carries with it the power to prevent laymen from practicing law."

Bieber contended, *inter alia,* that he was not engaged in the practice of law because his acts did not constitute "a course of conduct" and because he received no compensation for his services. The Court answered these contentions by stating that a single act may in an appropriate case constitute the practice of law and the receipt of a cash fee is also not necessary to constitute legal practice.

Justice Case dissented on the ground that the Court should avoid resort to its arbitrary contempt power unless the unlawful practice case is clear and there is no other adequate course. He believed that practicing law without a license is a criminal offense against society rather than an offense against the Court and defendants should be accorded the constitutional rights and protections accorded defendants in criminal proceedings. In addition, he remarked that there is question as to whether the act of drawing one will constitutes practice of law.

Citizens . . . Nationality Act of 1940 . . . American-born Japanese did not lose American citizenship when forced by fear into Japan's military service.

■ *Morizumi* v. *Acheson,* U.S.D.C., N.D. Calif., S. Div., December 14, 1951, Goodman, D. J.

■ Petitioner, an American-born Japanese, was taken to Japan when he was 8 years old and educated there. When war broke out he was 18 years old and later he was ordered to report for duty in the Japanese Army, which he did. However, in the instant action, he testified that he served because he was afraid to do otherwise, having been told that he would be severely punished for disobedience. In 1947, following his discharge from the army, his application for documentation as a United States citizen was denied on the ground that he had expatriated himself pursuant to §401 (c) of the Nationality Act of 1940, 8 U.S.C. 301c, by voluntarily serving in the Japanese Army.

The Court, after appraising petitioner's testimony, concluded that his service was, in fact, not voluntary. It found that he had no reasonable choice but to report for army duty and, further, that his service was "impelled by fear rather than by desire or willingness to further the cause of the Japanese government". Judge Goodman stated: "It would have required unusual courage and intense devotion to principle for anyone in petitioner's position to have protested. In view of the domination of the military over Japanese life, the gesture would undoubtedly have been futile. For petitioner to have asserted his United States citizenship as the basis for his refusal to serve, at a time when our bombing was reducing Japanese cities to rubble, would surely have resulted in the most serious consequences. In view of what is generally known of conditions in Japan, it is not likely that he would have escaped with merely a prison sentence." Judge Goodman further observed that of the eleven reported cases involving the voluntary nature of military service asserted as the basis for loss of United States citizenship, eight of them held the service to have been involuntary. He noted that the facts in one of the three cases holding the service voluntary, *Kondo* v. *Acheson,* 98 F.

Supp. 884, are similar to those in the instant case, but he believed the significant difference was that in the *Kondo* case "there was evidence that Kondo displayed zealous efforts to accomplish promotion in the Japanese Army".

Federal Trade Commission . . . quantity-limit rule for replacement tires and tubes . . . carload lot of 20,000 pounds maximum quantity justifying price differentials on replacement tires and tubes.

■ *In re A Quantity Limit Rule for Replacement Tires and Tubes Made of Rubber For Use on Motor Vehicles,* FTC, File No. 203-1, December 13, 1951 (Released January 4, 1952).

In this decision the Federal Trade Commission applied the quantity-limit provision of §2 (a) of the Clayton Act, as amended by the Robinson Patman Act, to establish a carload quantity of 20,000 pounds ordered at one time for delivery at one time as the maximum quantity which may be used to justify price differentials on replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles. The principle of the quantity-limit proviso, the Commission said, is that economies of mere size do not justify the risk of monopoly. Under the proviso, the applicability of the cost justification provision, which states that the only price differentials permitted are those which make only due allowance for differences in costs, may be restricted by Commission decision.

The Commission said that there were sixty-two buyers in the largest volume bracket of $600,000 to $50,000,000 and they, in comparison with their smallest competitors, paid from 26 to 30.5 per cent less for passenger tires and from 32 to 40 per cent less for truck tires. The Commission found that this price advantage must inevitably have a tendency to destroy the business of the many small buyers, because a 30 per cent differential would enable the largest buyers to resell at prices about equal to the smallest purchasers' costs. It concluded that such differentials were necessarily unjustly discriminatory because of the fewness of the buyers to whom they were available (about one in every thousand) and also promoted monopoly among the buyers. In support of this conclusion the Commission pointed out that the smaller buyers doing only about 52 per cent of the replacement business in 1947 had done about 90 per cent in 1926. In 1926 price differentials similar to the ones being considered first appeared, the opinion noted, and the Commission believes that this situation shows an unmistakable trend of the smaller buyers toward extinction and of the larger toward monopoly.

The Commission further found that the fewness of the big buyers rendered the differentials to them promotive of monopoly among sellers. The differentials on the larger quantities to the few big buyers were seen as being causally connected with a marked decline in the number of tire manufacturers and the concentration of the business in the hands of the largest manufacturers.

The Commission fixed a carload quantity of 20,000 pounds ordered at a single time for a single delivery as the maximum quantity on which price differentials may be granted because it found that there will be a sufficient number of available purchasers of that quantity so as not to render it unjustly discriminatory against purchasers in smaller quantities. The opinion said that the Interstate Commerce Commission has long applied the same principle to perform the same function and has prevented unjust discrimination against the smaller merchants and promotion of monopoly among the few larger ones by refusing to sanction cost-justification rate differentials on quantities not within the scope of smaller buyers. In the case of railroad transportation, the opinion noted, the lowest rate is typically on a carload. The ICC has consistently refused to permit lower rates based on the volume of shipments over a period of time, the opinion remarked, since discounts based on volume of transactions over a period of time are arbitrary whereas those based on a single transaction are not.

The rule will become effective April 7, 1952.

Commissioner Mason dissented because he believed the facts available in this proceeding did not demonstrate that purchasers in quantities greater than 20,000 pounds ordered at one time for one delivery were so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly. Also, he could see no real relationship between the finding that purchasers of annual quantities in excess of $600,000 were so few as to render differentials to them unjustly discriminatory and the rule establishing 20,000 pounds as the maximum quantity which may be used to justify price differentials.

Government Contracts . . . finality of contracting agency's decision . . . in absence of fraud, government cannot recover cost items paid out under a navy contract specifying that the Navy agency's verdict on questions of fact is final, although items were subsequently disapproved by General Accounting Office.

■ *Leeds & Northrup Co.* v. *U. S.,* U.S.D.C., E.D. Pa., December 27, 1951, Grim, D. J. (Digested in 20 U. S. Law Week 2274, January 2, 1952).

Plaintiff sought to recover $23,273.54 for goods delivered defendant, but in a counterclaim defendant alleged it had paid plaintiff by mistake $23,516.19 for expenses incurred by plaintiff in the performance of a contract it had with the Department of the Navy. After plaintiff's completion of the cost-plus-fixed-fee contract the Navy Bureau of Supplies and Accounts made a final certification of the total costs. However, two years later the General Accounting Office (GAO) took exception to reimbursements to plaintiff aggregating $23,775.64 theretofore made and ap-

proved by the Bureau pursuant to the contract. The Navy Department justified the allowability of most of the cost items but concurred in the GAO's exception to the extent of $351.77. The GAO was not a party to the contract and was not mentioned therein.

Plaintiff refused to refund the $23,516.19 claimed in defendant's counterclaim on the ground that this amount was properly paid under the terms of the contract, and further, that Article 7 (b) of the contract provided that "all disputes concerning questions of fact as to Allowable Cost arising under this contract shall be decided by the Chief of the Bureau of Supplies and Accounts . . . whose decision shall be final and conclusive upon the parties herein". The Court stated that the principal question in the case was whether under this provision the GAO had the authority to review a decision of the Chief of the Bureau of Supplies and Accounts as to what are allowable costs.

The Court noted that the GAO derives authority to adjust contract claims from §71 of the Budget and Accounting Act of 1921, 31 USC §41 *et seq.*, and that this authority has consistently been held subject to the parties' right to designate a person to make a final determination of disputes. "The most recent case in point", the Court remarked, is that of *James Graham Mfg. Co.* v. *United States*, 91 F. Supp. 715, which involved a disputes clause similar to the one being considered. In that case the court held that the Comptroller General, absent fraud or overreaching, does not "have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department". In addition, the Court said that under the decision in *United States* v. *Wunderlich*, 342 U. S. ——,72 S. Ct. 154 (38 A.B.A.J. 146; February, 1952), when a government contract specifies that the contracting agency's verdict on a question of fact is final, that verdict, in the absence of fraud, cannot be challenged in the courts. The instant court interpreted that decision to mean that it could not set aside the Bureau's determination in the instant case unless "fraud, meaning conscious wrongdoing or an intention to cheat or be dishonest" is alleged and proved. Plaintiff's motions for summary judgment on the complaint and counterclaim were granted, except as to the $351.77.

Grand Jury . . . court may not inquire into conduct of prosecuting attorneys during grand jury proceedings upon information allegedly received by defendants from unnamed member of grand jury.

■ *Commonwealth* v. *Smart et al.*, Pa. Supreme Ct., December 6, 1951, 84 A. (2d) 782, Stern, J.

This was a proceeding by the Commonwealth of Pennsylvania for a writ of prohibition restraining a lower court from permitting certain defendants who had been indicted by a grand jury to take testimony concerning the conduct of the prosecuting attorneys during the grand jury proceedings. Defendants' attorneys intervened and alleged that an unnamed grand juror had told them that the prosecuting attorneys had illegally advised and influenced them to find a true bill indicting defendants. The lower court granted their petition requesting the official reporter's record of the grand jury proceedings, although the Commonwealth had moved to dismiss the petition on the ground that the matters alleged to have occurred in the grand jury room ought not to be publicly or privately examined.

Stern, J., writing for the Court, ruled that the lower court's order for an investigation was allowed upon an insufficient showing and granted the writ of prohibition preventing the court below from enforcing its order. Justice Stern noted that although the rule that grand jurors cannot be examined to impeach the validity of their finding has been long established, there is "considerable contrariety of opinion" as to whether the mandate of secrecy permits disclosure of alleged improper acts on the part of the prosecuting officers in the grand jury room. The opinion noted that there are opposing considerations inasmuch as it is unfair to defendants to permit flagrantly unlawful conduct to go unaccounted for, but also, defendants should not be permitted to institute dilatory proceedings to divert the course of justice. Thus, certain situations might be presented which justified or necessitated an investigation of the conduct of a prosecuting officer, but such an investigation, the Court declared, should never be instituted "except on the basis of credible, detailed, sworn and persuasive averments by witnesses of the irregularities complained of". Emphasis was placed in the Court's opinion on the fact that the alleged information upon which defendants' petition was predicated was given defendants by an unnamed juror. The Court concluded that "It would be wholly preposterous to hold that a court would be justified in virtually putting the prosecuting officers to a defense of their conduct before the Grand Jury on a mere averment that an anonymous grand juror had made charges against them, not in a disclosure to the court, but in an alleged conversation with one of the defendants against whom the indictments had been found."

Labor Law . . . National Labor Relations Board jurisdiction . . . boycott by glaziers' union of building contractors using preglazed sash substantially affects interstate commerce . . . NLRB erred in treating boycott as series of separate local disputes and in refusing to assert jurisdiction since totality of situation in building and construction industry must be considered.

■ *Joliet Contractors Assn. et al.* v. *National Labor Relations Board*, C.A. 7th, January 7, 1952, Major, C.J.

Petitioners, who were general

contractors engaged in various phases of the building and construction business in Joliet, Illinois, petitioned the Court to review and set aside an order of the National Labor Relations Board dismissing an unfair labor practice complaint charging a glaziers' union with violating §8 (b) (4) (A) of the Act because of their boycott of local building contractors using preglazed sash. In a stipulation entered into at the hearing before the trial examiner it was agreed that, in general, the glass was delivered to the building contractor's shop from the glazing dealer's shop within the state, but the glass was manufactured outside the state and, further, that because union glaziers refused to work on jobs where preglazed sash is installed, the general contractors have had to choose between using preglazed sash or union glaziers exclusively. The Board, in dismissing the complaint, stated that because the operations of the employers involved are essentially local in character, the Board, in the exercise of its discretion, should decline to assert jurisdiction. In reaching this result the Board reasoned that the situation involved "a series of separate disputes, each involving a general contractor as the primary target, and a glazing subcontractor as the secondary target. In each dispute, both the primary and secondary employer was engaged in a purely local business, which affected commerce primarily because of 'indirect' purchases of materials . . . the situation was just as though a number of separate charges had been filed with the Board, each involving a different general contractor as the primary target of the Union's action."

The Court believed that the primary question in the case was whether "assuming that the Board has the discretionary authority 'to decline jurisdiction where the impact of the dispute on commerce is relatively insubstantial,' the more basic issue is whether the Board employed a correct yardstick or standard in evaluating such impact". The Court found that the Board does not have "the unbridled discretion to evaluate such impact by any standard which its fancy may suggest as expedient". It said that the Board's reasoning "ignores the realities of the situation" since the union's objective is to prohibit the use of preglazed material "and the fact that the victims of this illegal practice are picked off one at a time . . . does not dispel the irresistible conclusion that they are collectively the target of the Union activities. . . . We think the totality of the situation must be considered, both that which has resulted from the boycott as well as that which is likely to result, in measuring the commerce impact, rather than merely viewing the activities of each individual as the Board has done."

In addition, the Court's opinion explained that the Board had disregarded the real effect of a secondary boycott on the flow of building materials in interstate commerce since such a boycott stops the flow of building materials from the manufacturers to the dealers and thence to the contractors. The Court was unable to see how it could be thought that commerce is not substantially "affected" merely because the contractors purchase only a small proportion of their preglazed material directly from without the state. Also, the Court stated that the legislative history of the Act reveals that Congress was fully aware of the crippling effect on commerce produced by the secondary boycott and intended that such practices should be eradicated.

Circuit Judge Kerner dissented, stating that he believed that the Board has discretionary authority to decline jurisdiction where the impact on commerce is relatively insubstantial and the courts should not interfere with the Board's formulation of policy.

Securities and Exchange Commission . . . short-swing transactions under Securities Exchange Act of 1934 . . . partner whose firm, without his knowledge, realized a profit in short-swing transactions in stock of corporation of which partner was director, not liable for more than his own share of profits . . . other partners not liable for their share of profits.

■ *Rattner* v. *Lehman, Hertz and Consolidated Vultee Aircraft Corp.*, C.A. 2d, January 10, 1952, Swan, C.J.

Describing this case as one presenting "questions of novel impression", the Court analyzed the effect of the short-swing transactions profit ban of §16 (b) of the Securities Exchange Act of 1934, 15 USC §78p (b). In this case a partnership realized a $15,000 profit from the purchases and sales of 5,000 shares of stock of an aircraft corporation of which one of the partners was a director. His share of the partnership's profits was $806.62 which he paid the corporation when informed of them, the purchases and sales having been made without his knowledge. Section 16 (b) provides: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer, any profit realized by him from any equity security of such issuer . . . shall inure to and be recoverable by the issuer . . .".

The first question these facts presented, the Court declared, was the extent of liability of the partner who was also a director. It was contended that he must account for more than his own share of the firm's profits, but the Court rejected this line of reasoning, because the statute, read literally, makes a director liable for "any profits realized by him", and not liable for profits realized by the other partners. However, the Court cautioned that "Whether the result might be different had [the partner-director] caused the firm to make [the short-swing transactions] we need not now determine." In addition, it supported its conclusion by referring to Rule X-16A-3 (b) of the Securities and Exchange Commission which permits a partner to file a report "only as to that amount of such equity security which represents his proportionate interest in the

partnership".

The second question concerned the liability of partners other than the director. None of them were either beneficial owners of more than ten per cent of the corporation's stock or directors or officers of the corporation and §16 (b) does not require the partners of a director to account for profits realized by them. It was argued that this construction of the statute leaves a dangerous loophole, but the opinion answered that the legislative history of the Act indicates that the omission was intentional. Early drafts of the Act made liable any persons who acted on confidential information disclosed by a director, but this provision was eliminated before the statute was enacted.

L. Hand concurred in the decision, but stated that he wished "to say nothing as to whether, if a firm deputed a partner to represent its interests as a director on the board, the other partners would not be liable".

Venue . . . writ of mandamus not available to compel retransfer of patent infringement suit to California district court which had originally transferred suit to Delaware on ground that venue was improper . . . venue errors can be corrected after trial on appeal from final judgment.

■ *Gulf Research & Development Co., Welex Jet Services, Inc. and Byron Jackson Co.* v. *Leahy, U.S. Dist. Judge and Schlumberger Well Surveying Corp.*, C.A. 3d, December 13, 1951, Maris, C.J.

This was a petition for a writ of mandamus to the Chief Judge of the United States District Court for the District of Delaware directing him to transfer a patent infringement action back to the United States District Court for the Southern District of California where the suit was originally filed. The Southern California court had transferred the action to Delaware on defendant's motion alleging that the California District Court was the improper forum since it satisfied neither of the requirements of §1400 (b) of Title 28, USC, which states that patent infringement cases shall be brought either in the district of the residence of defendant or in the district where defendant has committed acts of infringement and does business. Plaintiffs, petitioners here, had urged that §1400 (b) must be construed in the light of the definition of corporate residence contained in §1391 (c) of Title 28 USC, to permit a patent infringement suit against a corporate defendant in any district in which it is doing business, even though no acts of infringement were committed there. The Southern California court agreed with defendant and transferred the case to the Delaware District Court. However, before the transfer order was executed, plaintiffs petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus prohibiting the California judge from transferring the case. This petition was denied on the ground that mandamus is an extraordinary remedy and that no extraordinary circumstances had been alleged. The Court said that an erroneous application of the law would be reviewable on appeal to the Court of Appeals for the Third Circuit after a final judgment had been rendered in the Delaware District Court. After the action had been transferred to Delaware plaintiffs moved to retransfer the case back to California, but their motion was denied and the instant appeal taken.

Agreeing with the Ninth Circuit, the instant Court refused to issue a writ of mandamus, even assuming, it stated, that the Southern California court's transfer decision was erroneous. The error, it declared, was one which plaintiffs will be entitled to assert upon appeal from the Delaware District Court's final judgment. The opinion remarked that "Since an appeal in this action will be just as adequate as in any other case where an objection to jurisdiction or venue is overruled by the trial court and after a trial on the merits the objection is sustained on appeal there are here no extraordinary circumstances which call for resort to the extraordinary remedy of mandamus. The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeals but does not constitute ground for invoking mandamus power." Reference was then made to the Supreme Court's statement in *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, that "an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to . . . thwart the Congressional policy against piecemeal appeals".

Petitioners also argued that writs of mandamus have been granted to compel transfers of venue under the *forum non conveniens* provision in §1404(a) of Title 28, USC, but the Court replied that the cases granting such writs normally dealt with the issue of the convenience of the parties and witnesses, which must be reviewed before trial, if at all. Therefore, the Court said that in such cases mandamus is available to prevent an abuse of discretion. The opinion conceded that the courts of appeals have occasionally gone so far as to entertain on their merits applications for mandamus in §1404-(a) cases which involved a want of statutory authority to make the proposed transfer, rather than merely an abuse of discretion, but nevertheless the present Court thought itself bound by the reasons stated in the Supreme Court's opinion in the *Roche* case.

Further Proceedings in Cases Reported in This Division

■ The following action has been taken in the United States Supreme Court:

CERTIORARI DENIED, January 14, 1952: *Armour & Co.* v. *Louisiana*

Southern Railway Co.—Carriers (37 A.B.A.J. 845; November, 1951).

Additional Recent Decisions of Interest

▪ *Application of Wellhofer,* N.J. Superior Ct., Woods, J. 83 A. (2d) 827.

A first impression case—right to counsel fees and expenses incurred in connection with investigation into municipal expenditures.

▪ *Domurat* v. *Mazzaccoli,* Conn. Supreme Ct. of Errors, Inglis, J. 84 A. (2d) 271.

Another first impression case—validity of covenant not to enter a competing business made by a mere employee of the seller of the business.

▪ *Mississippi Baptist Hospital* v. *Holmes,* Miss. Supreme Ct., McGehee, Ch. J., 55 So. (2d) 142.

State high court overrules doctrine of charities' immunity from tort liability.

▪ *Barr Lumber Co.* v. *Shaffler,* Cal. Dist. Ct. of Appeals, 3d Dist., Griffin, J., Dec. 11, 1951, 238 P. (2d) 99.

Priority of mortgage on land over liens for material used in construction of building.

▪ *Pyeatte* v. *Bd. of Regents of U. of Okla.,* U.S.D.C., W.D. Okla., Wallace, J. Dec. 19, 1951,——F. Supp. ——.

Power of board to require unmarried students to live in university dormitories.

▪ *Smith* v. *Bd. of Apportionment,* Ark. Supreme Ct., Smith, Ch. J., Dec. 16, 1951, — S.W. (2d) ——.

Senatorial redistricting under Apportionment Amendment.

Nominating Petitions

Arkansas

▪ The undersigned hereby nominate Edward L. Wright, of Little Rock, for the office of State Delegate for and from the State of Arkansas, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

J. S. Daily, Harry P. Daily, John P. Woods, H. P. Warner, Lem C. Bryan, G. Byron Dobbs, John E. Miller, G. C. Hardin, T. B. Pryor, Jr., and Heartsill Ragon, of Fort Smith.

Gordon E. Young, E. W. Brockman, Jr., W. F. Coleman, Louis L. Ramsey, Jr., E. W. Brockman, John H. Jones, Nicholas J. Gantt, Jr., R. A. Eilbott, Jr., Henry W. Gregory, Jr., Jay M. Dickey, Hendrix Rowell, Frank G. Bridges, Jr., Stephen A. Matthews, Robert A. Zebold and Palmer Danaher, of Pine Bluff.

Idaho

▪ The undersigned hereby nominate William S. Holden, of Idaho Falls, for the office of State Delegate for and from the State of Idaho to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

J. Blaine Anderson, of Blackfoot;

Oscar W. Worthwine, Carey H. Nixon, J. L. Eberle, Chase A. Clark, William H. Langroise, Ralph R. Breshears, Charles E. Winstead and Charles F. Koelsch, of Boise;

S. T. Lowe, of Burley;

Robert N. Elder and William S. Hawkins, of Coeur d'Alene;

Henry S. Martin, Robert V. Kidwell, Ralph L. Albaugh, Warren Joseph Anderson and Paul T. Peterson, of Idaho Falls;

Robert E. Brown, of Kellogg;

John W. Cramer, of Lewiston;

Earl E. Garrity, of Nampa;

Ralph H. Jones, of Pocatello;

Harry Benoit and John R. Keenan, of Twin Falls;

Walter H. Hanson, of Wallace;

George Donart, of Weiser.

Idaho

▪ The undersigned hereby nominate E. B. Smith, of Boise, for the office of State Delegate for and from the State of Idaho to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

David Doane, Eugene H. Anderson, Z. Reed Millar, Willis C. Moffatt, James H. Hawley, Glenn A. Coughlan, Merlin S. Young, Samuel Kaufman, Jr., Laurel E. Elam, Edward W. Rice, Harry S. Kessler, Charles F. Koelsch and Karl Paine, of Boise;

Hugh N. Caldwell and S. Ben Dunlap, of Caldwell;

Gregg R. Potvin and W. C. Loofbourrow, of American Falls;

William B. Davidson, of Meridian;

Abe McGregor Goff, of Moscow;

John H. Norris, of Payette;

A. L. Merrill, Alfred C. Cordon, Wesley F. Merrill, R. D. Merrill and Darwin D. Brown, of Pocatello.

Indiana

▪ The undersigned hereby nominate Telford B. Orbison, of New Albany, for the office of State Delegate for and from the State of Indiana to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Leon H. Wallace, of Bloomington;

John H. Edris, of Bluffton;

Julian H. Sharpnack, of Columbus;

Joseph T. Ives, of Delphi;

Philip E. Byron, Jr., of Elkhart;

William T. Fitzgerald, of Evansville;

William G. Keane, of Fort Wayne;

Richard P. Tinkham, Alfred H. Highland and Wasson J. Wilson, of Hammond;

Frank C. Olive, Ralph Hamill, Thomas M. Scanlon, Kenneth Foster and Perry E. O'Neal, of Indianapolis;

Charles C. Fox, of Jeffersonville;

Roger D. Branigin, of LaFayette;

W. H. Parr, Jr., of Lebanon;

Carl M. Gray, of Petersburg;

George F. Stevens, of Plymouth;

John M. McFaddin, of Rockville;

Walter B. Keaton, of Rushville;

Milton A. Johnson, of South Bend;

Elliott Hickam, of Spencer;

John Rabb Emison, of Vincennes.

(Continued on page 250)

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The Nebraska unicameral legislature has been the subject of much discussion. A further contribution to the literature on the topic is the following informal and personal account by a former legislator. The author is a member of the Lincoln, Nebraska, Bar.

The Nebraska Unicameral Legislature

By Thomas Mockett Davies

■ The history, background and theory of the unicameral Nebraska legislature have been described in numerous books and articles.[1] Without repeating the discussion of these matters, I shall point out my own observations and conclusions based upon serving one term in this legislative body during the 1949-1951 biennium.

The unicameral system in Nebraska must be considered in connection with the streamlined rules which make it workable, the excellent research facilities of the Legislative Council and the equally excellent bill-drafting service. These items are all a part of its fabric and texture and have been constantly improved upon by succeeding legislatures and legislative employees. Many of them were not used in the old Nebraska bicameral and are not now used in present state bicameral legislatures.

Probably the most acute sensation experienced by a Nebraska legislator is that of being in a goldfish bowl. This feeling is accentuated by the fact that no office space is available to him and his desk in the senate chamber must also serve as his "private" office.[2] Under the unicameral system the "pitiless light of publicity" reaches everywhere. Although a committee in passing upon a bill usually acts in executive session, the press is always there. After a bill has reached the legislature from committee, the constitution provides that any member may call for a record vote upon any question.[3] All record votes are taken upon an electric voting machine, which records and tabulates each vote in less than thirty seconds. Upon the final passage of a bill, the rules require that a record vote be taken upon the voting machine, and it is further provided that this rule shall not be suspended.[4] Thus on the final passage of a bill, each legislator is shown as having voted "aye" or "no" or "not voting". All record votes are recorded in the *Legislative Journal*, which is a permanent record of the proceedings of the legislature.

A bill "tossed into the hopper" receives full publicity from the time of its introduction until it is killed or finally passed.[5] In accordance with a constitutional requirement, every bill which is amendatory is so drawn by the bill drafter's office that all new matter is shown in italics and stricken matter is lined out.[6] This same procedure is followed on final reading, at which time the bill is again printed to show not only the amendments proposed in the original bill but all amendments made by committee or by the legislature since introduction. This printed copy on final reading is placed upon each member's desk at least two days before the vote on final passage.

Every bill must be referred to a committee.[7] Before taking final action on a bill, a committee must hold a public hearing thereon and shall give at least five calendar days' notice, by publication in the *Legislative Journal* of the date and time of hearing.[8] The Lincoln, Omaha and outstate newspapers co-operate in giving wide publicity to the dates and times of committee hearings.

Legislators are expected to handle the presentation before committees of bills which they introduce and the rules provide: "Members shall introduce only such bills as they are willing to endorse and support personally."[9] For this reason a legislator must carefully scrutinize every bill which he is asked to introduce and even then he will make mistakes.

The Nebraska Legislature receives excellent technical assistance. The

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"The Unicameral Legislature: Its Operation in Nebraska" by Galen Saylor in *Teachers' Pamphlet No. 5*, October, 1937, published by Nebraska State Teachers Association, Lincoln, Nebraska.
Debater's Handbook by Bower Aly, Columbia, Missouri.
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Debater's Digest, September, 1937, "Should We Adopt the One House Legislature?"
"Two Legislative Houses or One" by O. Douglas Weeks, Arnold Foundation Studies, Vol. VI. No. 3, Southern Methodist University, Dallas, Texas.
"Unicameral Legislatures", The Reference Shelf, Vol. 11, No. 1, H. W. Wilson Co., 950-72 University Avenue, New York.
American Experience with Unicameral Legislatures by Charles W. Shull, Detroit Bureau of Governmental Research, 1937, 5135 Cass Ave., Detroit, Mich.
Unicameral Legislatures with Study Outline by J. Weston Walch, 1937, Platform News Publishing Co., Portland, Maine.
Unicameral Legislatures by E. C. Buehler, Noble & Noble, New York, 1937.

2. As might be expected in a unicameral legislature, the legislative chamber is known as the senate chamber and the legislators are called senators.

3. Constitution of Nebraska, Article III, Sec. 11. (amended 1934)

4. Rules of the Nebraska Legislature, 1950, Rule 9, §§1 and 2.

5. See mimeographed chart "Course of Bill in Nebraska Legislature" and mimeographed outline "History of a Bill in the Legislature", both prepared by Hugo F. Srb, Clerk of the Nebraska Legislature.

6. Constitution of Nebraska, Art. III, §§13 and 14.

7. Rules of the Nebraska Legislature, 1950, Rule 14, §1.

8. Rules of the Nebraska Legislature, 1950, Rule 6, §3.

9. Rules of the Nebraska Legislature, 1950, Rule 11, §2.

Legislative Council operates an office which is open the year round and employs a director of research, a librarian, and stenographic and clerical help. The present director of research serves part time in that capacity and also teaches political science at the University of Nebraska. The office of the clerk of the legislature is also open on a full-time basis. The bill-drafting service is available to legislators, beginning one month before the opening of each session and continuing during the session. This service is confidential, efficient and rapid. After the session is finished the bill drafters act as statute revisers in a continuing process of statute revision. As a result the bill drafters are more thoroughly acquainted with Nebraska statutes than any other lawyers in Nebraska.

The Nebraska unicameral legislature has received criticism and attempts have been made to amend the present system. As far as I know, no serious proposals have been made to return to the old bicameral system. Some of the criticisms which have been made of the present system, together with my analysis of them, are as follows:

Criticism: There are too few members (43), and the lobbyists and pressure groups, by concentrating on so few legislators, have gained too much power.

From the standpoint of the work load falling on each legislator, there are too few members. Each member must attend the regular morning sessions of the legislature, which last until noon, and then attend committee meetings every afternoon, Monday through Friday, from 2:00 to 5:00 P.M. A bill was passed in the 1949 legislature proposing a constitutional amendment increasing the number of legislators and increasing their salaries. This amendment was defeated by the electors, probably because it contained the salary increase provision.

Nebraska has strict laws regulating lobbyists.[10] All lobbyists and their employers must register with the Secretary of State and file monthly financial reports. The statutes even apply to a lawyer whose only "lobbying" activity is an appearance before a committee to argue for or against a bill. The calibre of members of unicameral legislatures has been high, and in my opinion the forty-three members in the unicameral are not as susceptible to pressure and lobbying as they would be if the membership were much higher.

Criticism: The nonpartisan feature of the unicameral has resulted in lack of leadership and lack of party discipline. The legislature has tended to be a debating society composed of forty-three prima donnas, all going in different directions.

It should be conceded and stressed at the very beginning that the strong two-party system in our Federal Government is of the very essence and heart of our American system of government. It should be strengthened and retained at all costs. But the issues which divide us nationally are not the issues which are presented to the Nebraska legislature. The problems of the State of Nebraska are essentially nonpartisan in nature and very seldom, if ever, does a vote on a particular measure divide on party lines.

In the 1951 session a bill was introduced for the submission to the electors of a constitutional amendment providing for the election of members on a partisan basis. Leaders of both political parties appeared before the committee in favor of this bill, but it was indefinitely postponed by the committee. Its sponsors sought to raise the bill on the floor of the legislature (majority vote needed if motion made within three legislative days after the committee report)[11] but the motion lost, with 25 nays, 15 ayes, and 3 not voting.

The original opponents of the unicameral plan predicted that the Governor would exercise complete domination over such a small legislative body. This criticism has been reversed and the criticism is now heard that since the membership is nonpartisan, the Governor does not have enough control over the legislature and is unable properly to sponsor and push his legislative program. The Governor has the right of veto, and a three-fifths vote of the elected members is required to pass a bill over the Governor's veto.[12] It is my observation that the Governor has received support and leadership in the legislature on any legislative program which he has chosen to present.

In the selection of speakers of the unicameral legislature, selections have been made in the past on the basis of ability, and not on the basis of partisan politics.

Criticism: Too many bills are introduced.

This is a valid criticism. The large number of bills introduced adds to the length of the session and adds to the work of each member without adding to his compensation. However, no more bills have been introduced in the unicameral sessions than in the old bicameral sessions, allowing for the fact that duplicate bills were often introduced in both houses in the latter sessions.

Criticism: The unicameral legislature costs more to operate than the old bicameral legislature.

The clerk of the legislature has compiled statistics in pamphlet form comparing the bicameral and unicameral systems in Nebraska[13] which show that the bicameral sessions were more expensive. For example, the last and most expensive bicameral in 1935 lasted 110 days and cost $202,593.49. The unicameral sessions have all cost substantially less. The last (1951) and most expensive unicameral lasted 102 days and cost $130,080.85.

Criticism: Under the unicameral system bills are passed too fast.

Even with all the publicity, the committee hearings and the steps prescribed by the rules for the passage of a bill, some bills are passed without sufficient consideration and debate. A partial answer to this problem would be the introduction of

10. Revised Statutes of Nebraska, 1943, as amended, C. 50, Art. 3.
11. Rules of the Nebraska Legislature, 1950, Rule 6, §9.
12. Constitution of Nebraska, Article IV, §15.
13. "Brief comparison of the bicameral and unicameral legislative systems and rules and laws governing their operation in Nebraska"—Pamphlet prepared by Hugo F. Srb, Clerk of the Legislature, Capitol Building, Lincoln 16.

fewer bills, wider publicity, a slow down in the legislative process at the risk of slowing down the work of the legislature, together with a greater public interest in pending legislation.

Criticism: Unicameral legislatures spend too much money.

The amount of money needed to operate the government of the State of Nebraska has risen sharply in recent years. This has been due primarily to the increased demands upon state government for services and to inflation. In this respect the situation in Nebraska has been no different from that in other states.

The members of Nebraska unicameral legislatures have been conservative and tax conscious. In recent sessions the legislature has been strongly opposed to the creation of new bureaus or regulatory boards. As far as I know all bills creating new bureaus in the 1949 and 1951 sessions were killed.

The legislature so far has refused to pass either a sales or income tax. The reason has been a feeling on the part of legislators that no new taxes should be levied unless they at least partially replace the tax on real property, which already is high. It has been the consensus that the only way this could safely be accomplished was by constitutional amendment. In common with other states, Nebraska needs more money for roads, state institutions, state normal schools and for the state university. Legislators have recognized these needs but have been determined that large additional funds shall not be created by the imposition of new taxes, unless and until these funds are earmarked for specific purposes. Otherwise these additional funds serve as a target for every type of request for increased appropriations. An example in 1949 was the position taken by the proponents of a bill for state aid to education. They appeared before the revenue committee hearing on the consideration of a sales tax and stated that they were in favor of the sales tax if all the revenues therefrom were allocated to state aid to education, and that otherwise they were opposed to the sales tax. They later scaled their demands down to 50 per cent, but their thinking remained the same: that here was a nice, new, large and additional fund to take care of a nice, new, large and additional item in the state budget.

Even though the amount needed to run state government in Nebraska has increased in the last few years, Nebraska in 1950 still had the fifth lowest per capita taxes of any state in the United States.[14]

Some of the proposals which have been made to increase the efficiency of the unicameral system, and with which I agree, are as follows:

1. Increase the membership of the legislature to relieve the present work load of the members.
2. Elect members for a staggered four-year term to replace the present two-year term. This would insure longer tenure for each member and also insure more continuity in membership for each session.
3. Raise the salaries of the members.
4. Get additional space so that members can have a private office in which to work.

One of the disturbing things in the 1949 legislature was the fact that eight of the younger men in the legislature, including myself, five of them lawyers, and five of them serving their first term, did not run for re-election. This represented a loss to the State of Nebraska because a legislator is more efficient after having served one term. The reason for their failure to run for re-election is obvious. A young professional man, particularly a lawyer, cannot afford to spend five months out of each biennium serving in the legislature. The answer to the problem is not so obvious and I do not have the answer. Raising salaries would not help very much. My experience was that it was impossible to carry on the practice of law, spend some time with my family and also serve in the legislature. My oldest boy, age eleven, summed up the attitude of my family when he said that if I ran for the legislature again he would work for my opponent.

It is my belief that the Nebraska unicameral legislature has proved to be a conservative, efficient and capable legislative body. The members with whom I served were honest, able and sincere men. They were leaders in their communities and displayed leadership in the affairs of state. The present three Republican candidates for governor and the last Democratic candidate for governor were all former members of unicameral legislatures. One is now Mayor of Lincoln and two were former speakers of the legislature.

In these disquieting times when United States Congressmen and federal officials have been convicted of bribery and corruption and when many state legislatures are under fire for alleged corruption, no scandal has ever attached to the Nebraska unicameral legislature.

14. "Tax Systems", Supplement to 12th Edition, 1951, page 62, Commerce Clearing House.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

The Anglo-Norwegian Fisheries Case

■ On December 18, 1951, in its judgment in the Fisheries Case between the United Kingdom and Norway,[1] the International Court of Justice expressed views on the delimitation of territorial waters which are of general interest far beyond the bounds of that particular case. For the first time, a series of authoritative statements have been made which may be most useful in clearing up some of the conflicting attitudes with respect to territorial waters that were disclosed at the abortive discussions of the 1930 Hague Conference on the Codification of International Law.

The Fisheries Case was instituted by a British application filed with the Court on September 28, 1949. During the two years which followed, some 1900 pages of written proceedings were submitted on behalf of the two governments; these were climaxed by five weeks of oral argument in the fall of 1951. At the hearings Sir Eric Beckett, Legal Adviser to the Foreign Office, appeared as agent of the United Kingdom, and the Attorney General, Sir Frank Soskice, and others appeared as counsel; on the Norwegian side, Dr. Sven Arntzen, of Oslo, and Professor Maurice Bourquin, of Geneva, appeared as agent and counsel respectively. Twelve members of the Court heard the case, Judges Fabela (Mexico) and Krylov (U.S.S.R.) being absent because of ill health and Judge Azevedo (Brazil) having died in May, 1951.

The precise subject of the dispute was the validity under international law of a Norwegian royal decree of July 12, 1935, delimiting a fishery zone reserved exclusively to Norwegian vessels off the coast of Norway north of 66° 28′ 48″ north latitude (approximately the Arctic Circle). The zone was bounded by lines four miles seaward of straight base-lines drawn between fixed points on the mainland or off-lying islands or rocks. Forty-eight such points, many of them located on rocks or reefs dry only at low tide, were specified in an annexed schedule, the distance between them varying from a few hundred yards to forty-four miles.

Although the decree did not expressly refer to the zone as territorial sea, both parties agreed that the area involved was in fact that claimed by Norway as territorial sea and the case was argued and decided on that basis. It was clearly understood that the question was not one of a state's power to create a conservation zone beyond its territorial waters, and the Court's reasoning was not restricted to fisheries. Nor was the four-mile width claimed by Norway disputed by the United Kingdom; the latter, though affirming its adherence to a three-mile limit as a general rule, conceded that Norway was entitled to maintain a four-mile limit on grounds of long-established usage.

The dispute therefore focused on the proper location of the base-lines from which the marginal sea should be measured. The British, who retreated somewhat from their original contentions during the case, ultimately submitted that in general under international law the base-line must follow the low-water mark on permanently dry land, and that straight lines might only be used to close off bays not over ten miles wide at the entrance. They conceded, however, that on historical grounds and as an alleged exception to the general rule, Norway was entitled to claim all fjords and sounds in the disputed area, including the waters between the mainland and the thousands of off-lying islands and rocks—the *skjaergaard*—fringing much of the northern Norwegian coast.

In order to determine the outer limit of the marginal sea, the British urged the Court to accept and apply the so-called "arcs of circles" method suggested originally by the United States delegation to the 1930 Hague Conference. This complex technique, too involved to elucidate here in full, calls for defining the outer limit of the marginal sea as the line formed by the envelope of a series of interconnecting arcs, drawn from all points along the coast and having a radius equal to the width of the marginal sea. Though they claimed that this method was the most desirable, the British admitted in argument that it was not obligatory.

In its judgment the Court took decisions on two principal questions. It held first, by ten votes to two, that the system of delimitation employed in the 1935 decree was not contrary to international law; and second, by eight votes to four, that the specific base-lines laid down in the decree pursuant to this system were not contrary to international law. Norway's victory was therefore complete and unequivocal.

In discussing the propositions for delimitation advanced by the United Kingdom, the Court came to the conclusion, insofar as it was necessary to pass upon them, that they did not represent rules of international law. International law did not require states to confine their methods of delimitation to such narrow formulae as the British suggested. Off heavily indented coasts, it would often be impossible to adhere to all the sinuosities of the low-water mark; "such a coast, viewed as a whole, calls for the application of a different method". The arcs of circles approach, described by the Court as "a new technique in so far as it is a method for delimiting the territorial sea", might be acceptable, but it was not obligatory. Several states (such as Norway) had preferred straight lines joining appropriate points on the low-water mark, and had encountered no objections

1. I.C.J. Reports, 1951, page 116.

of principle from other states. Such lines were not necessarily restricted to bays, but might be used wherever there were coastal islands such as the *skjaergaard*, which the Court held to be "an extension of the Norwegian mainland" and the real coast line of Norway.

With respect to the length of such straight lines, the Court expressly observed that the ten-mile rule for bays had "not acquired the authority of a general rule of international law". So also, attempts to apply an analogous ten-mile rule to determine the status of waters between islands and within coastal archipelagoes had "not got beyond the stage of proposals". Under such circumstances, the Court declared, "the coastal State would seem to be in the best position to appraise the situation" with respect to the selection of base-lines.

Though thus denying the existence of "rules having the technically precise character alleged by the United Kingdom Government", the Court went on to say that this did not mean that the Norwegian delimitation was

> not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

Three criteria were then laid down by the Court which, though admittedly not entirely precise, were said to furnish a basis for decision and which could be adapted to diverse factual situations. These were as follows:

> (1) Base-lines must not depart appreciably from the general direction of the coast taken as a whole, although the coastal State has reasonable latitude to adapt its delimitation to practical needs and local requirements;
>
> (2) The sea areas lying within the lines must be sufficiently closely linked to the land territory to be subject to the regime of inland waters;
>
> (3) Important economic interests peculiar to a region and evidenced by long usage are to be taken into account.

The Court found that the system of delimitation employed in the Norwegian decree of 1935 and foreshadowed in earlier decrees was an adaptation to local conditions of the applicable principles of general law; it was not an exception to these principles. Hence it was not necessary for the Court to decide whether such exceptions could be justified on historical grounds. The Court, however, did look upon the long history of Norway's claims as indicating—along with geographical and economic factors—that a need for delimitation had long existed and had been met by the methods developed by Norway without objection from abroad. It further observed that these methods had received such notoriety since their inception in decrees of 1812 and 1869 that the United Kingdom could not plead ignorance of them.

Having thus decided Norway's general approach to be not inconsistent with international law, the Court considered whether the specific base-lines of the 1935 decree were or were not justifiable. Attention was directed to two areas particularly challenged by the United Kingdom: the Svaerholt basin, which the decree closed off by a base-line 38.6 miles in length, and the Lopphavet basin, closed off by a line 44 miles in length. The former, but not the latter, was found by the Court to have the character of a bay in view of all the geographical factors involved; but the term "bay" was not defined by the Court, which neither approved nor rejected a definition proposed by the British. In both cases, however, the lines drawn by Norway were held not to violate the Court's criteria and to be justifiable under the circumstances.

From the judgment of the Court two judges dissented—Sir Arnold McNair (United Kingdom) and Read (Canada). Judges Alvarez (Chile) and Hsu Mo (China) delivered separate opinions. Judge Hackworth (United States) concurred in the operative part of the judgment on the ground that in his opinion Norway had proved an historic title to the waters involved in the dispute.

In theory, under Article 59 of the Court's Statute, the judgment is binding only between the parties and in respect of the particular case. Yet the broad reasoning of the Court, which did not confine itself to the peculiarities of the Norwegian situation, inevitably gives the judgment a wider significance. This is reflected in the fact that the United Kingdom, prior to the delivery of the judgment, notified the Court that it reserved the right to reconsider in the light of the decision its claims to territorial waters off the northwestern coast of Scotland, where off-lying islands create a geographical situation somewhat like that off Norway. Sir Eric Beckett was likewise reported in the press to have said after the judgment that his Government would "naturally" examine the effect of the decision as a "precedent for general application".

In view of such intimations from the United Kingdom, the most steadfast supporter of a narrow construction of territorial waters, it may be expected that other states also will reconsider their policy in the light of the decision or will consider their previous attitudes vindicated. The Court's judgment has disposed of several notions which have sometimes been alleged, particularly in Anglo-American practice, to be rules of international law: for example, the ten-mile limit for bays, rigid adherence to low-water mark on permanently dry land, and resort to abstract geometric formulae for delimitation. Instead, the Court emphasized the need for flexibility in meeting specific situations, the special competence of the coastal state to judge its needs, and the importance of economic as well as physical factors in determining appropriate limits. It would now seem that if a

coastal state determines its territorial waters with moderation and common sense, and with due regard to the general criteria laid down by the Court, it need not fear challenge because its approach does not comply with any particular set of preconceived technical notions on delimitation.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

A Tax Problem in Corporate Liquidation

■ A troublesome problem may crop up where stockholders of a liquidated corporation are held liable for the corporation's debts as transferees. The liquidation may take place in one year while the stockholder-transferee may not have to make good on the corporation's obligations until a later year. In that situation there is a split of opinion beween the Second and Third Circuit Courts of Appeals as to whether the transferee's payments constitute a fully deductible ordinary loss or a capital loss.

In one case, *Commissioner* v. *Switlik*, 184 F. (2d) 299 (3d Cir. 1950), the stockholders realized a long-term capital gain in 1941 as the result of a liquidating distribution from their corporation. In 1942, the Commissioner assessed deficiencies against the corporation for 1940 and 1941. The corporation appealed and final agreement on the amount was reached in 1944. Because of the 1941 liquidating distribution, the corporation was unable to pay the deficiencies and the stockholders paid instead as transferees. They reported these payments in their 1944 returns as ordinary losses incurred in a transaction entered into for profit. The Commissioner claimed that the payments were capital losses "deriving their nature from the liquidation in 1941" which was a capital transaction.

The Tax Court held for the taxpayers (13 T.C. 121), and the Third Circuit affirmed. Both courts used the same approach in turning down the Commissioner's argument. First, they referred to the now well-established Supreme Court rule that each taxable year must be considered a separate unit. This rule was announced in *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417 (1932), and most recently invoked in the *United States* v. *Ellis R. Lewis*, 340 U. S. 590 (1951). On that basis, the transferees' payment of the corporation's taxes in 1944 constitutes one transaction, while their receipt of a liquidating distribution in 1941 is another and entirely separate one. Second, the payment of transferee liability in 1944, taken by itself, is neither a *sale* nor *exchange* of capital assets. Consequently, the payment cannot be a capital loss and must of necessity be an ordinary loss.

The Tax Court faced a similar situation in *Frederick R. Bauer*, 15 T.C. 876 (1950). The only difference was that the transferees satisfied a judgment against the liquidated corporation instead of a tax deficiency. The court cited and followed the *Switlik* decision in allowing the transferees an ordinary loss on the payment of the judgment. On appeal, the Second Circuit reversed, specifically disagreeing with the *Switlik* decision. *Commissioner* v. *Bauer*,—F. (2d)—(2d Cir. January 10, 1952).

The Second Circuit recognizes the well-settled principle of treating each taxable year as a separate unit. But it holds that that rule "does not mean that an examination of the previous year's return may not be made in order to determine the nature of the new fact for the purpose of ascertaining how a gain or loss is to be categorized in computing taxable income". On that basis, the loss in the current year arose out of a corporate liquidation in earlier years, and is therefore a capital loss resulting from a sale or exchange.

It is interesting to note the Second Circuit's reference to its own decision in *Commissioner* v. *Carter*, 170 F. (2d) 911 (2d Cir. 1948) and to the Ninth Circuit's decision in *Westover* v. *Smith*, 173 F. (2d) 90 (9th Cir. 1949) in connection with its "looking-back" rule as stated in the *Bauer* case. In those earlier cases, stockholders received property on corporation liquidation which had no ascertainable value when distributed to them. Payments made to the distributees on that property in later years were held to be capital gain rather than ordinary income. Both courts took the position that the subsequent payments were, in effect, a continuation of the liquidation, which remained open with respect to the property having no ascertainable value at the time of distribution.

The *Bauer* case seems to go quite a bit beyond the *Carter* and *Smith* cases. There is no question of continuing and finishing a capital transaction, but rather a problem of relating two separate transactions which took place in different taxable years. Whether this is consistent with the rule that each taxable year is to be treated as a separate unit will very likely become a Supreme Court issue in view of the split between the Second and Third Circuits.

The problem of connecting taxable events which occur in different taxable years is not peculiar to corporate liquidations. For example, it has been thrashed out frequently in connection with transfers of stock which are subsequently challenged

for some reason by either the buyer or seller. The results here are as inconclusive as in the area of corporate liquidation, although there is no clear-cut split between any courts. *Harwick* v. *Commissioner*, 133 F. (2d) 732 (8th Cir. 1943), *aff'd sub nom. Dobson et al.* v. *Commissioner*, 320 U. S. 489 (1943), reh. den. 321 U. S. 231 (1944); *Margery K. Megargel*, 3 T. C. 238 (1944) (acq.); *Duveen Brothers, Inc.*, 17 T.C. No. 15 (1951).

Since there is a direct circuit court split on the corporate liquidation issue and since there is no established rule in any analogous situation which might serve as a guide, a lawyer will probably want his client to avoid entirely, if possible, any transferee payments similar to those made in the *Switlik* and *Bauer* cases. Otherwise the payments which might have been fully deductible by the corporation may become limited capital losses to the stockholder-transferees after liquidation, if the view of the Second Circuit prevails. To minimize this risk, it may be advisable after distributing the major part of the assets to retain a reasonable amount of cash or other liquid assets in the corporation for some time before making the final distribution. Any corporate liabilities uncovered during that time can be paid by the corporation. This procedure cannot be used as absolute insurance against transferee liability, but it will certainly lessen an unnecessary risk.

Contributed by committee member
Leon Gold

OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

Inter-American Junior Bar Section

■ The first meeting of the Junior Bar Section of the Inter-American Bar Association was held in Montevideo, Uruguay, from November 21 to December 2, 1951, in conjunction with the Seventh Conference of the I.A.B.A. The formal launching of this new Section successfully climaxes the movement begun in 1941 by the JBC Committee on the Inter-American Bar.

At its initial meeting, the Section approved, with minor amendments, the draft of by-laws prepared by the Organizational Committee under the leadership of Ella C. Thomas, of Washington, D. C., immediate past chairman of the JBC Committee. As a fitting tribute to her efforts in establishing this new Section, Mrs. Thomas was unanimously elected Chairman of the new Section. Other officers elected were Dr. Pedro J. Mantellini of Carácas, Venezuela, Dr. Enrique Vescovi of Montevideo, Uruguay, Dr. Aldo Busot of Havana, Cuba, and Dr. Pessoa da Silva, of Rio de Janeiro, Brazil, Vice Chairmen; Dra. Esperanza Puente of Mexico City, Secretary; Dr. Mario Nin of Montevideo, Uruguay, Treasurer. A representative from each member country was elected to the Executive Council and Rachel Woody Hanes, of Washington, D. C., was chosen as the United States member.

The Section considered several interesting papers on subjects of interest to all young lawyers. The papers that dealt with the interdependence of young lawyers and the older members of the Bar and with economic and related problems of young lawyers were presented by Miss Hanes, Dra. Electra Etcheverry, Dr. Rafael Addiego Bruno and Dr. Nin of Uruguay. In addition, preliminary plans for the next meeting to be held in Carácas, Venezuela, in 1953 were discussed.

The visiting delegates were entertained royally by their Uruguayan hosts. The functions tendered the guests included receptions by the President of Uruguay, the Foreign Minister, the Supreme Court and the American Embassy, as well as a full-day trip to Punta del Este, world-renowned sea resort. The highlight of the social functions for the younger lawyers was a luncheon given by the young lawyers of Montevideo at a restaurant atop a hill commanding a magnificent panorama of the city.

The JBC delegation included in addition to Mrs. Thomas and Miss Hanes, Eileen C. O'Connor of Washington, D. C., and Paul N. Temple, Jr., of New York City. Other countries represented at the Junior Bar Section meeting were Argentina, Brazil, Mexico, Uruguay and Venezuela.

Harris & Ewing

EILEEN C. O'CONNOR

Chairman, Committee on the Inter-American Bar

The JBC Committee on the Inter-American Bar, under the chairmanship of Miss O'Connor, will continue to assist the new Section and to this end is planning a drive throughout the United States for members in the new Section. Under the by-laws, membership is open to all lawyers who are 38 years of age and under, and are members in good standing of a national, state, or local bar association affiliated with the I. A. B. A. Membership dues are $2.00 for two years. Members of the JCB who are interested in affiliating with the new Section are requested to forward their application for membership and their dues to Miss O'Connor, One Scott Circle, N.W., Washington, D. C.

Activities of Sections and Committees

SECTION OF INSURANCE LAW

▪ A stenographic transcript of the Panel on "Trial Tactics" held Wednesday, September 19, 1951, in the Grand Ball Room, Hotel Roosevelt, New York City, was made and the Section plans to have this published at an early date. The pamphlet will be sent to all members of the Section. The Panel is believed to have attracted the largest attendance of any meeting the Section of Insurance Law has ever held. After 1,250 members were in the main ball room and balcony, the management of the Roosevelt Hotel directed attention to the Fire Ordinance and would not permit anyone else to enter.

Forrest A. Betts, Chairman, Los Angeles, has earned the thanks of the Section of Insurance Law.

Members participating were James Dempsey, Peekskill, New York, introduction of panel members; John T. Loughran, Chief Judge of the Court of Appeals of the State of New York, moderator; Lon Hocker, Jr., St. Louis, "Preparation and Discovery"; Oscar J. Brown, Syracuse, "Selection of Jury and Opening Statement"; Harry A. Gair, New York City, "Presentation of the Case"; Francis X. Busch, Chicago, "The Expert Witness"; Raoul D. Magaña, Los Angeles, "The Medical Witness—Preparedness and Examination", Theodore Kiendl, New York, "Summation of the Case".

It was the consensus of the Section that the New York meeting was the finest the Section has ever enjoyed.

SECTION OF JUDICIAL ADMINISTRATION

▪ As a result of action taken at the New York Annual Meeting last September, the Section's Committee on Improvement of Traffic Courts is stressing its efforts to improve the traffic courts of the nation by two methods.

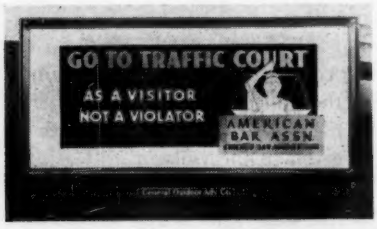
. Letters were sent to the presidents, secretaries and executive secretaries of all state bar associations urging their support for adoption of the Uniform Traffic Ticket and Complaint. The Uniform Traffic Ticket serves as a legal complaint against traffic law offenders, as well as a waiver for the Violations Bureau and as a "court docket". It can also be used as a written warning to drivers and pedestrians. The ticket has twenty-four boxes for checking the six most common traffic violations and twenty-one boxes for checking the most common road conditions that contribute to the seriousness of a violation of the traffic laws.

. The ticket contains an original and three carbons—the first (original) copy serving as a complaint for the court, the second being retained by the police officer, the third going to the police file and the fourth to be given to the violator.

The literature being distributed to the state associations emphasizes these important features of the uniform ticket: (1) It permits uniform interpretations of traffic laws by all officers; (2) It permits uniformity of instruction to officers and administrative action within the police department; (3) It aids the prosecutor by permitting more consistent case preparation; (4) It enables the judge to make more nearly uniform evaluations of the seriousness of the violations that he is trying; (5) It enables the violator to know the exact nature of the violation with which he is charged; and (6) It informs the public of the unsafe maneuvers that result in accidents and makes for more nearly uniform and consistent court action, thus increasing their confidence in the fairness of judicial treatment of traffic offenses.

Cities interested in adopting the Uniform Traffic Tickets can obtain them from the Weger Business Systems, Inc., 117 West Shiawassee Street, Lansing 1, Michigan, which is producing them in mass quantities, allowing the tickets to be sold at substantial savings. Current prices range from $26.45 for ten thousand sets to $38.12 for a thousand sets. Further information on the tickets

Panel on Trial Tactics, Hotel Roosevelt, New York.



can be obtained from James P. Economos, Director, Traffic Court Program, American Bar Association, Suite 1848, 1 North LaSalle Street, Chicago 2, Illinois.

The Traffic Court Committee is continuing its efforts to secure public support for its safety program "Go to Traffic Court as a Visitor—Not a Violator". A test conducted in Illinois, Indiana and Ohio last year proved highly successful. The posters contain the slogan "Go to Traffic Court as a Visitor—Not a Violator". A typical poster used in Chicago is pictured on this page.

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

▪ Of importance to all lawyers is the proposed codification and revision of the patent laws embodied in pending H.R. 3760, the major provisions of which have been approved by the Association. This is the first attempted general revision of the patent laws since the general consolidation of all federal laws resulting in the Revised Statutes of 1874. It is a part of a program of revising all fifty titles of the U. S. Code, of which nine have been enacted.

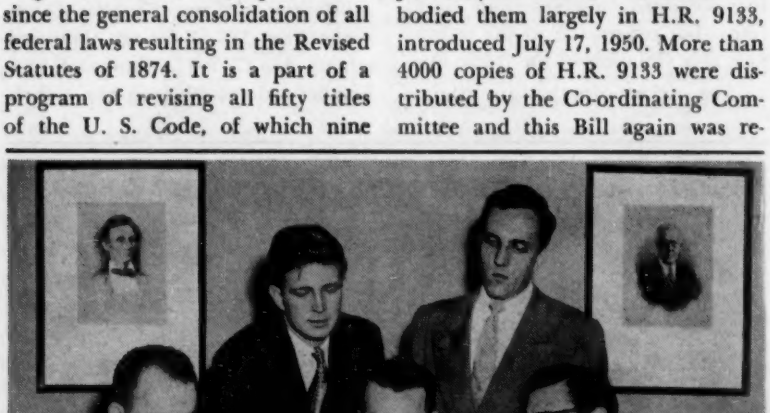
The work was initiated by a subcommittee of the House Committee on the Judiciary, which called in as experts P. J. Federico of the Patent Office and Captain George N. Robillard of the Department of Defense. It issued a "Committee Print" and circulated it among the Patent Bar and industry. The National Council of Patent Law Associations, which includes the nineteen principal patent law associations in the country, formed a co-ordinating committee and a drafting committee to review the Committee Print and suggest desirable revisions, limited to substantially noncontroversial amendments to existing law. At this point the Co-ordinating Committee was joined by the patent committees of a number of industry associations.

The Committee Print was subjected to thorough study by all the associations represented and numerous reports and suggestions were sent to the Drafting Committee which prepared a redraft, representing its best judgment as to what would meet with general approval. This redraft was again widely circulated among interested parties.

The Co-ordinating Committee held a series of meetings and carefully studied the redraft section by section, submitting its results to the Judiciary Subcommittee, which embodied them largely in H.R. 9133, introduced July 17, 1950. More than 4000 copies of H.R. 9133 were distributed by the Co-ordinating Committee and this Bill again was reviewed in detail over a period of six months by participating associations which again reported to the Drafting Committee. That Committee studied these reports and at a further meeting of the Co-ordinating Committee they were considered and the Bill voted on section by section. In March, 1951, this Section most carefully discussed and debated that draft during a special three-day meeting in Washington called for that purpose.

The result of this exhaustive work was embodied in H.R. 3760 (the Bryson Bill), now under consideration. More than 5000 copies of this revised Bill were distributed and, after study, suggestions were considered at a meeting of the Co-ordinating Committee in Washington attended by 30 representatives of 27 associations. Public hearings on H.R. 3760 were held June 13-15, at which twenty-five witnesses representing the participating associations, the profession, industry, and government unanimously supported virtually every provision of the Bill. In addition, supporting resolutions from twenty-one associations and a large number of supporting letters and telegrams were filed with the Committee.

Perhaps rarely in legislative history has a bill had such thorough and expert study and received such overwhelming support. It is hoped that H.R. 3760 will be reported on at the present session of Congress and that it may be passed as a noncontroversial codification bill and receive the hearty support of the Bar.



American Law Student Association

The mid-year meeting of the national executive officers of the American Law Student Association, the national student bar association sponsored by the American Bar Association, was held January 25-27 at Southern Methodist University School of Law, Dallas, Texas.

Pictured here during the conference are, seated, left to right: the Director of the Law Student Program, Chester J. Byrns; President Dwight E. Hill, and Treasurer Charles F. Mitchell. Standing, left to right: Executive Vice President C. David Whipple and Secretary William R. Tincher.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

▪ The Third Annual Institute on the Law of Oil and Gas and Taxation, sponsored by the Southwestern Legal Foundation, was a great success. Dean Robert G. Storey, President of the Foundation, presided. Subjects included antitrust and other statutory restrictions of unit agreements; compulsory unit operation; procedure, proof, validity and legal effect; the unit operation of public lands; oil and gas depreciation; oil and gas accounting problems; and tax problems arising out of the unitization agreements.

▪ The Public Relations Committee of the Atlanta Bar Association and Lawyers Club of Atlanta, John H. Boman, Jr., Chairman, published during the fall and early winter in both Atlanta papers a series of thirteen institutional advertisements prepared under the direction of the Committee by a leading public relations firm. The cost for these advertisements was approximately $1,500. The public relations firm donated its services. The Committee has also sponsored a television program, "Frederick Ashley, Attorney at Law". The program was presented every Sunday evening for ten weeks and emphasized preventive law. The television series was a contribution of four Atlanta banks.

▪ The Section of Judicial Administration's Illinois Committee, under the chairmanship of Owen Rall, is co-operating with the Joint Committee on Illinois Civil Procedure appointed by the Chicago and Illinois State Bar Associations. The Joint Committee has formulated a list of suggested changes for improvements in procedural statutes and rules. The reporter for the Committee is Professor Edward W. Cleary of the University of Illinois College of Law. In general, the suggestions indicate that the Bar is satisfied with the present Civil Practice Act but clarification of some provisions seems to be required. The Committee will examine present procedure relating to summary judgments and judgments on the pleadings, as well as broader provisions for interpleader and third-party practice. A subject of primary importance is the problem of reducing the cost of appeals and, particularly, the high cost of printing.

▪ The Membership Committee of the Iowa State Bar Association has reported that the Association now has a total membership of 2,583. This number represents the greatest number of paid members in the history of the Association. Over fifty counties have 100 per cent membership. The Association in December sponsored its largest tax school. Nearly nine hundred lawyers were in attendance and a wide variety of subjects were discussed by leading tax experts. Those attending the school received bound outlines of the discussions. At the annual dinner a court skit written by Carl F. Conway, a member of the Association, was presented.

▪ All four candidates selected for endorsement by the Judicial Campaign Committee of the Cleveland Bar Association for election to the Municipal Bench in the recent election were successful in being re-elected to office.

The Judicial Campaign Committee placed two advertisements in each of the three Cleveland daily newspapers and also placed ads in the foreign language, labor and metropolitan papers of the city. In addition to this, direct mail literature was sent to members of the Bar and some nine thousand penny post cards were mailed to registered voters. Also, members of the Association and their friends distributed some fifty-five thousand campaign cards. Active in supporting the judicial ticket of the bar association were the Chamber of Commerce, the Junior Chamber of Commerce and the Academy of Medicine.

As in the past, there was a large percentage of votes cast in the judicial election and approximately 65 per cent of those voting cast a nonpartisan judicial ballot.

George B. HASTINGS

Rinehart-Marsden, Inc.

▪ The fifty-second annual meeting of the Nebraska State Bar Association was held in Omaha in November, with a near record attendance of 750. On the day preceding the opening of the convention the association held an institute on "The Organizational Problems of Small Businesses" under the sponsorship of the Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Speakers on the institute program were Arch M. Cantrall, of Clarksburg, West Virginia; James H. Spencer, of Detroit, Michigan, and Ralph U. Heninger, of Davenport, Iowa. More than 200 Nebraska lawyers from forty-seven towns and cities registered in attendance at the institute.

Speakers on the meeting program were Howard L. Barkdull, President of the American Bar Association; Francis X. Busch, of Chicago, whose subject was "The Art of Direct and Cross Examination of Witnesses"; and William H. Fitzpatrick, of New Orleans, Editor of the *New Orleans States*. Under the title "An Editor Looks at Some Law", Mr.

Fitzpatrick discussed the Declaration of Human Rights and the Genocide Convention with particular emphasis on their effect upon domestic law. Mr. Fitzpatrick was Pulitzer Prize winner in 1951 for a series of editorials upon the same subject.

Afternoon meetings were devoted to the Section on Insurance Law; the Section on Administrative and Labor Law; the Section on Municipal Law and the Section on Real Estate and Probate Law. The Junior Bar Section held a business session and sponsored a luncheon meeting on the first day of the convention.

Elected as officers for 1952 were President, George B. Hastings, of Grant; Vice Presidents, H. L. Blackledge, of Kearney; Harry B. Cohen, of Omaha and Perry W. Morton, of Lincoln. Newly chosen as Member at Large of the Executive Council is Barton H. Kuhns, of Omaha.

Nominating Petitions

(Continued from page 239)

Maryland

■ The undersigned hereby nominate William C. Walsh, of Cumberland, for the office of State Delegate for and from the State of Maryland to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

James C. Morton, Jr., and William J. McWilliams, of Annapolis;

Harry N. Baetjer, Joseph Bernstein, Frederick W. Brune, Edward H. Burke, H. Vernon Eney, George Gump, F. Hall Hammond, E. Paul Mason, William R. Semans, Roszel C. Thomsen, Frank B. Ober, Robertson Griswold and Richard F. Cleveland, of Baltimore;

V. Calvin Trice, of Cambridge;

George Henderson, Morgan C. Harris, Walter C. Capper and William R. Carscaden, of Cumberland;

K. Thomas Everngam, of Denton;

David W. Byron and Robert H. McCauley, of Hagerstown;

Ralph W. Powers, of Hyattsville;

F. W. C. Webb, of Salisbury.

Minnesota

■ The undersigned hereby nominate William W. Gibson, of Minneapolis, for the office of State Delegate for and from the State of Minnesota to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

William P. Harrison, Donald D. Harries, Howard P. Clarke, Albert R. Morton and W. K. Montague, of Duluth;

James D. Bain, Charles B. Howard, John S. Pillsbury, Jr., Loring M. Staples, Glenn S. Stiles, Robert J. Christianson, Paul Christopherson, Wendell O. Rogers, Paul J. McGough and Donald L. Robertson, of Minneapolis;

M. J. Galvin, Agnes M. Anderson, Stephen Schmitt, Maurice W. Stoffer and Albin S. Pearson, of St. Paul;

John E. Harrigan, Karl G. Neumeier, Reuben P. Thoreen, John F. Thoreen and Roderick A. Lawson, of Stillwater.

New Hampshire

■ The undersigned hereby nominate Louis E. Wyman, of Manchester, for the office of State Delegate for and from the State of New Hampshire to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Robert W. Upton, Richard F. Upton, John H. Sanders, Dudley W. Orr, Robert H. Reno and Willoughby A. Colby, of Concord;

John W. Perkins, of Hampton;

Philip H. Faulkner, of Keene;

William S. Lord, Thomas P. Cheney and Robert P. Tilton, of Laconia;

Winthrop Wadleigh, Robert P. Booth, Maurice F. Devine, Ralph E. Langdell, Louis C. Wyman, John P. Carleton, Arthur A. Greene, Jr., John J. Sheehan, Albert H. White, James A. Manning, Thomas F. Donovan and Samuel A. Margolis, of Manchester;

Harry W. Peyser and William F. Harrington, Jr., of Portsmouth.

New York

■ The undersigned hereby nominate Franklin E. Parker, Jr., of New York City, for the office of State Delegate for and from the State of New York, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Neil G. Harrison, of Binghamton;

Weston Vernon, Jr., Harrison Tweed, Whitney North Seymour, E. J. Dimock, Harold J. Gallagher, Thomas N. Tarleau, Mark F. Hughes, Kenneth M. Spence, Robert M. Benjamin, J. Edward Lumbard, Jr., Henry G. Hotchkiss, John W. Davis, Leonard D. Adkins, William Dean Embree, Chauncey Belknap, Edwin A. Falk, Caesar Nobiletti, William C. Chanler and Bruce Bromley, Henry Harfield, of New York;

Lewis C. Ryan, Benjamin E. Shove, Arthur W. Agan, and Stewart F. Hancock, of Syracuse.

West Virginia

■ The undersigned hereby nominate Frank C. Haymond, of Charleston, for the office of State Delegate for and from the State of West Virginia, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Fred L. Fox, Thomas B. Jackson, Edward D. Knight, Jr., Andrew L. Blair, John C. Morrison, Charles W. Moxley, Robert G. Kelly, Hawthorne D. Battle, and J. M. Woods, of Charleston.

Wright Hugus, Kent B. Hall, and Robert J. Riley, of Wheeling;

Fred L. Davis, Claude P. Light and Robert B. McDougle, of Parkersburg;

Buford C. Tynes, Bert H. Early, Taylor Vinson, O. P. Keadle and Jackson N. Huddleston, of Huntington;

John R. Morris, James Clifford McManaway, James M. Guiher, Oscar J. Andre and Chesney M. Carney, of Clarksburg.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Mr. Lutz, Mr. Hamilton and the Patent System

■ In these bitter times members of a learned profession especially should shun unwarranted epithets and accusations of identification with the Communist enemy. The sort of thing ably caricatured by Stuart Chase:

> "Communists favor public housing;
> Senator Taft sponsored a bill for public housing;
> Therefore Senator Taft is a Communist"

is unfortunately found in Mr. Lutz's recent article (37 A.B.A.J. 905) entitled "A Proper Public Policy on Patents: Are We Adopting the Soviet View?"

The article turns out to be essentially another jeremiad about the supposed hostility of the Supreme Court and of certain writers toward some aspects of our patent system. I will leave the Supreme Court to abler defenders, calling particular attention to Houston Kenyon's observations in 35 A.B.A.J. 306 (1949), which dispelled some of the phantoms Mr. Lutz again invokes to frighten us.

The purpose of this letter is to protest the manner in which some vague views about the "Soviet view" are dragged into a familiar controversy. That controversy has to do with the theses advanced in TNEC monograph No. 31, *Patents and Free Enterprise*, of which the chief author was Walton Hamilton. On almost any subject the views of Professor Hamilton, a distinguished teacher and unquenchable American, are worth discussion: it is not surprising that *Patents and Free Enterprise* still strikes sparks. An instance of reasoned criticism of some of its theories is Professor S. C. Oppenheim's address printed in 40 *Trade Mark Reporter* 613 (1950). We know that Mr. Lutz also is capable of stimulating analysis of our patent law, from his paper on the meaning of the constitutional clause in 17 *George Washington Law Review* 50 (1949).

But from the present essay we learn little more than that the "Soviet view" discourages private enterprise, which will surprise no one, and rewards individual inventors, not with a monopoly, but with "small bounties". An unsuccessful attempt is then made to link *Patents and Free Enterprise* with this socialist, Marxist, Soviet, and therefore wicked system. If, in search of more light on the Russian attitude toward inventors, one consults E. O. Anderson's "Nationalization and International Patent Relations" in 12 *Law and Contemporary Problems* 782 (1947), one finds, at page 784, that in the U.S.S.R. "Research and professional invention is a select career and its practitioners enjoy above the average income, housing, food and clothing rations, and educational advantages for their children". The proper American policy, I suppose, must then be to insure that our inventors enjoy below average incomes and educational advantages for their children.

One way to avoid such downright absurdity is to avoid irrelevant references to Russia in debates about patent policy.

RALPH S. BROWN, JR.
Yale University Law School
New Haven, Connecticut

No Freedom for the Thought That We Hate?

■ My greatest concern in the debate between Mr. Wiener[1] and Mr. Katz[2] is, not that we as a nation shall be guilty of depriving innocent "heretics" of their constitutional rights, but that in the maze of argument and debate on the question so much indecision will result that we may nurse the viper of Communism in our bosom too long—with the result that our very vitals may be stricken.

As I see it, American democracy's quarrel is not with communism as a political theory, even as we have no quarrel with certain other countries over their preference for a king rather than a president and a congress. Rather, our quarrel is with those who seek to overthrow that Government which we have established over a period of some 175 years. But the Communists have sought to cloak themselves with a constitutional immunity so that they may continue their undermining efforts at will; they attempt to shield themselves with the very thing they are trying to destroy. They have attempted to cast upon our courts and law enforcement officers the onerous appellation of "persecutors" in order that those who are unable to comprehend their tactics will immediately take up the cry. Such delusions make it impossible for us to see these Communists for what they really are, *viz:* traitors.

To say that our thoughts and actions, in dealing with the Communists during the past six years, have been based upon pure logic would indeed be a misstatement. During and following World War II we welcomed them as trusted allies, providing lend-lease and loans, and giving them valuable military secrets.

1. Wiener, " 'Freedom for the Thought That We Hate': Is It a Principle of Our Constitution?", 37 *A.B.A.J.* 177, March, 1951.
2. Katz, " 'Freedom for the Thought That We Hate': It is Not a Principle of the Constitution", 37 *A.B.A.J.* 901; December, 1951.

Even after they displayed their true intentions it was thought politically expedient not to alienate them by letting them know that we would tolerate no nonsense. This "pussyfooting diplomacy" is apparently the continued advice of some who, through a process of what they call "legal constitutional reasoning", have arrived at the conclusion that we should sit back and let the Communists do as they please in their unconcealed attempts to overthrow our government. Those Communists who have violated our laws and our Constitution are *criminals*. Why, then, do we persist in our half-hearted attempts to prosecute them?

On the battlefield of Korea it has been our determined policy to kill as many of them as possible; here, we nurse their cause by protecting their partisans. Is there any logic to such action as this?

Young men who violate our federal statute by failing to register for military service, perhaps because of some religious scruple, are tried and sentenced for such violation. They have not actively sought to overthrow our government and no one raises the cry of religious "persecutor" when referring to the courts that sentence them. On the other hand, the Communists not only do not fight to aid our country, but they engage in activities that are calculated to destroy our government. And immediately upon their being charged with their deeds as criminal acts we are badgered into thinking that we are persecuting them by depriving them of their constitutional liberties. Is there any justification for our permitting them to confuse us in this matter?

In some cases the bail for Communists charged with attempting or conspiring to overthrow our government has been reduced by the courts to a paltry $5,000; yet an American citizen charged with robbery is forced to post bail in the amount of $10,000. Which crime is the more serious—an attempt to rob one person of his purse, or an attempt to rob 150,000,000 people of their democratic freedoms? It occurs to me that we must realign our values.

Now, the thesis of this is not that our Government should seek to destroy any ideology not in perfect harmony with our own, nor that courts should go beyond the pale of the law in cases involving Communists. The thesis is simply this: that the laws prohibiting conspiracies to overthrow our government be enforced; that we recognize those who violate these laws as criminals; that the seriousness of the crime charged be recognized by the courts; that upon conviction fines and sentences be imposed as the crime deserves; and that lawyers defending accused Communists be fined and/or imprisoned for contempt of court just as any other lawyer, practicing in those same courts on different matters, would be fined and/or imprisoned for a contemptuous attitude.

Finally, we should dispel this smoke screen of alleged "constitutional privilege" with which the Communists have blinded us. We know their aims, and if, just as in any other criminal matter, strenuous measures are warranted, they should be taken regardless of any threat of propagandistic lies, for, regardless of the action we take such lies will be broadcast far and wide—and we know it. The Communists charged with violations of law have no right to any less nor any more constitutional privileges than does any one else charged with the commission of a crime.

It behooves us, then to enforce our laws as they are meant to be—without malice or hatred, but with the determination that those who violate them shall suffer the penalties thereof without delay, and without "special considerations".

MILFORD D. ESTILL
Artesia, New Mexico

Are There Unamendable Parts of the Constitution?

■ I was astounded when I picked up my December issue of the AMERICAN BAR ASSOCIATION JOURNAL, and found at page 915 a statement by one of your editorial writers to the effect that the Constitution of the United States guarantees to the Communists the right to advocate an amendment of the Constitution so as to provide a totalitarian form of government.

In my opinion this statement is wholly unwarranted and is made without a consideration of any portion of the Constitution other than the First Amendment.

The Constitution provides, in Article IV, Section 4, that the United States shall guarantee to every state in this union a republican form of government. If a republican form of government is guaranteed it is difficult to understand upon what theory or premise anyone would have the constitutional right to advocate the overthrow of that form of government and replace it with a totalitarian form of government. No one has ever contended that a communistic form of government is a republican form of government. I for one vigorously protest the position which is apparently taken by the editors of the JOURNAL and which, in effect, places the blessing of the organized Bar of the United States upon the supposed right of any person to advocate Communism predicated solely upon the assumption that free speech is the only portion of the Constitution to be considered. I am certain that the organized Bar does not sanction this viewpoint and

that it does not represent the opinion of the majority of the Bar.

HENRY E. KAPPLER
Los Angeles, California

Editor's Note: In making the criticized statement we perhaps did not give sufficient recognition to the respectable body of opinion that the Supreme Court may yet hold that certain matters are inherently beyond the amending power. See 1 *Willoughby on the Constitution*, 2d Ed. §333.

An Appropriate Distinction in an English Citation

■ In his delightful essay on the place of the *Restatement* in the English courts, 37 A.B.A.J. 329, Lord Justice Denning has alluded to the fact that, not so long ago, the judges in the English courts allowed textbooks to be cited only after the author was dead or, if it was a joint work, after the joint authors were dead. It may be entirely satisfactory to Sir Alfred if *Huber* v. *Steiner*, 2 Bingh. (N.C.) 202, 132 Eng. Rep. 80, is cited in this connection. In that well-known conflicts case, heard in June, 1835, the Common Pleas Court was referred to Story's *Commentaries* and the Lord Chief Justice, Sir N. C. Tindal, said, speaking for the court: "a distinction has been sought . . . by the learned counsel for the Defendant . . . . This distinction is stated to be adopted from a work entitled *Commentaries on the Conflict of Laws*, p. 487, by *Joseph Storey* [sic], LL. D.; a work which it would be unjust to mention without at the same time paying a tribute to the learning, acuteness, and accuracy of its author. And undoubtedly, the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded" (at page 211).

The *Commentaries* had come out in 1834; they had been reviewed in the February, 1835, issue of the *Legal Examiner and Law Chronicle* (Vol. 4, page 512), published by Maxwell in London, and in the *Edinburgh Law Journal* (Vol. 2, page 427), published by Thomas Clark, who brought out the Edinburgh reprint of the work the same year. May it be that, because of the immortality of the work, the author was treated as dead by the court? This would give credit to the court for a fine and quite appropriate distinction. Story, much alive, did not omit to refer to *Huber* v. *Steiner* in the second, 1841, edition of his work. *Huber* v. *Steiner* may be the first case in which an English court referred to Story's *Commentaries on the Conflict of Laws*.

KURT H. NADELMANN
Harvard Law School
Cambridge, Massachusetts

Another Disapproves of Holmes Article

■ The discussion of Mr. Justice Oliver Wendell Holmes' philosophy, although it has taken a personal turn as is manifest from Ben W. Palmer's article in the November, 1951, JOURNAL, does not seem to be a private argument and I would like to enter it with this brief comment. From the notes on Mr. Palmer's article, however, I gather that the JOURNAL is limited primarily to exponents of the "natural law", that is, to Holmes' critics, and I may be barking up the wrong tree. If I am, please let me know promptly so that I may turn to the *Harvard Law Review* where the defenders of Mr. Holmes are holding forth.

Essentially, Mr. Holmes is accused of not believing in "absolute, immutable truth". Mr. Palmer tries to give the impression that by this expression he means such truth as "that two and two are four"; that is, objective truth which is experimentally determinable. In actual fact of course, Mr. Palmer and the other proponents of "natural law" do not mean anything of the kind. They mean subjective truth, the mystic beliefs of a deeply religious person, which are rarely based on experiment and are sometimes held in spite of experimental results to the contrary. On this basis it would seem, as is actually borne out by the histories of the Nazi and Communist movements, that it is Holmes' critics and not Holmes that lay a philosophical basis for Naziism and like ideologies. That these people are pointing a finger at Holmes should not surprise anyone who has watched the antics of the Nazis and the Communists in recent years.

To believe in "absolute immutable truth" one must know what the "absolute immutable truth" is and anyone who thinks he knows the absolute immutable truth is a dangerous fanatic, so to speak he is Hell bent for Heaven. . . .

It is fundamental in the law that judgment is based on acts and not on mere thoughts. The detractors of Holmes are trying to judge him on his thoughts as gleaned from their interpretation of his writings although except for Pegler who seems to be more frank than the others, they split his personality. One fact stands out strikingly in judging

Holmes from his acts; Holmes would never have burned any one at the stake for disagreeing with his theories of the origin of the universe. I wonder if the believers in "natural law" can make the same claim as to the followers of their philosophy.

H. DIAMOND
Pittsburgh, Pennsylvania

Law Office Experience for Law Students

■ In reading the November, 1951, issue of the JOURNAL, I was impressed quite forcibly with the editorial, "Education for the Practice of Law". I have realized that practically all of the young lawyers entering the actual practice find themselves at a loss in applying the theory imparted to them in the law school. The practical application of the knowledge gained through the years of study is not an easy one. My suggestion is that, in communities where practical, law school students should be given the opportunity of spending some time in law offices, where they may acquire the knowledge of how the practice of law is interpreted in a practical manner.

While I was at Northwestern, and with the proximity of the law school to the business section of Chicago, I was fortunate in being able to spend at least two hours every day in a law office where there were assigned to me various duties which included briefing, examination of witnesses and preparation for trial, as well as actual trial work in the municipal court, together with numerous other duties in bankruptcy courts, attending assignments and the many more functions delegated to a novice clerk in a law office.

The experience thus gained has been of inestimable value. I have had many young lawyers in my office over the span of years of my practice and, while most of them were very capable, and, in fact, some really brilliant, they were at a loss to apply in a practical manner the knowledge secured in school.

I know that this procedure may be difficult in small communities, but at least it can be applied in places where law offices may be open for students for that purpose. I am passing this suggestion on for such consideration as the law schools may wish to give to it....

EDWARD E. BARON
Sioux City, Iowa

Objective Reporting Instrument of Freedom

■ Since lawyers are constitutionally touchy about nonlawyers undertaking to practice law, we, who are strictly amateurs in the profession of journalism, would seriously endanger our cervical vertebrae if we should presume to tell the Fourth Estate how to run a newspaper. When, however, they touch upon the administration of justice, or perhaps even the very foundations of a free society, which all professions (including the press as well as the law) are under the highest duty to protect, we lawyers cannot conscientiously remain silent.

A little while back the editor of the *Christian Science Monitor* remarked, "Objective journalism is basically wrong; the facts need careful interpretation." This was quoted with approval by Walter Winchell, who is himself seldom accused of objective reporting; and he added that it was not only basically wrong but "agonizingly dull".

To the legal mind, trained in eliciting the truth and devoted to the ideal of freedom under law, this is an amazing thesis—one that we dare to hope is not universally subscribed to in the journalistic world.

We had always thought it axiomatic in the American system of democracy that when the people know the truth they can usually be depended upon to reach sound conclusions. Conversely, when the people are misinformed, either outrightly or by half-truths and innuendoes, the results can be cataclysmic.

The whole question is does subjective or interpretative reporting usually convey the truth, or at least the whole truth, to the mind of the ordinary reader?

To take a simple illustration, it may be less interesting (and therefore sell fewer copies) to read: "The witness looked at the defendant." But can you be as sure that it is accurate and disinterested if, instead, it says that she stared or glared or leered or sneered or ogled at him?

The point is that a single emotionally colored word or glittering generality proceeding out of the emotion, judgment or prejudice of the reporter may change the whole effect of his story. To the extent that it does so in the guise of a news despatch, which the average reader accepts as fact, to that extent it is departing from the truth. Many issues of vital importance, from jury verdicts to elections and other decisive expressions of popular will, may turn on the effects of such despatches on public opinion.

As with the law, the practice of journalism is a public trust because it affects the public welfare so intimately. As with the law, that fact obligates practitioners to a high degree of ethical conduct.

It follows that when a newspaper or magazine exercises its undoubted right—indeed its obligation—to influence public opinion through interpretative commentary on news events, the impressions and deductions must be plainly expressed as those of a named writer or of a responsible though unnamed editor. When it purports to give the facts, they must come straight through the eyes and ears of the reporter, uncolored and unedited except for purposes of clarity and brevity.

A people cannot remain free unless its skilled professions remain free. The professions can remain free only to the extent that they maintain the highest possible standards of self-imposed professional ethics, entitling them to their positions of trust.

We not only deny that objective reporting is basically wrong. We hail it as an indispensable instrument of freedom. And if it is ever agonizingly dull, that is due either to the verbal poverty of the writer or to the triviality of his subject.

W. CLARK HANNA
Philadelphia, Pennsylvania

The Graduate Legal Clinic
(Continued from page 192)

was true of the facts of the wide world then is true today—or as though common beliefs as to the effect of legal devices could be taken as accurate descriptions. Indeed much talk which makes the law is based on such assumptions. There may have been times when such assumptions were valid. The analytical researches and writings of Williston and Wigmore and Mechem were undertaken toward the close of a long period of stability. The facts had stood still long enough to be grasped within the articulate phrases of appellate decisions. When those decisions were analyzed, the results coincided—if not perfectly, at least pretty much with the reality. This is scarcely true today. Legal research cannot be fully effective if it is confined to the reported decisions of courts of last resort. What lawyer has not had the experience of reading a decision in a case he has tried, even a favorable decision, with the uneasy realization that the facts recited in the opinion, or on which the reasoning is based, are interesting—but are significantly different from what actually occurred.

If the law needs understanding and if research is the way to that understanding, then the research must get at the facts. A clinic can focus attention on the difference between actual problems and the problems in the books. It can guide theory so that it arises out of cases and fits the needs of the people involved. Research, law teaching and lawmaking always must be, in a sense, theoretical. But as with medicine so with law, it is important that theory or criticism of theory be not far removed from the actual cases which pose the problems. A law school should have direct access to the problems. The combination of practice-training and service-giving should make it feasible for a clinic to be part of a research center.

A clinic as part of a research center is most appropriately, I believe, a graduate clinic. It should have as its head a trial lawyer of wide experience who has the respect of the Bar. It should be staffed by graduate lawyers who can examine witnesses, eventually conduct trials and who can devote their full time to an exploration of the problems raised by the cases. It should have close working relations with other parts of the university, such as the school of social service administration, parts of the medical school and of the social sciences. These branches of the universities are now at work on research projects that are central to the lawyer's practice in the fields of legal aid and criminal law. I do not think it in accordance with the history of the law, or the position that lawyers occupy, that such research projects should be conducted in the main without participation by lawyers or the professional schools of law. I do not think it is good for society that the lawyer should be relegated to the position of merely an instrumentalist carrying out the wishes of nonlawyer experts with respect to such matters, as for example, the criminal treatment to be given to sexual psychopaths or the revision of divorce statutes. The graduate legal clinic can be one co-operative enterprise that will help restore the lawyer to his research responsibilities.

The proposal that I make is not new. Much of it is inherent in Judge Frank's call for lawyer schools. It builds on the long experience of legal clinics. It is implicit in a suggestion made thirty-two years ago by Dean Wigmore, who wrote: "There is only one sound method—the method of the future—and it is this: For each legal aid clinic there will be from ten to fifty positions (according to the size of the community), each having a stipend of the amount usually paid in local law offices. The funds will be supplied either by private endowment of the society, or by university endowment, or by bar association contributions. A professor of practice will be in charge of the young attorneys; and at his call will be a staff of specialists for occasional advice in special classes of litigation. The professor of practice will so allot, supervise and conduct the work as to give it the maximum education value." Dean Wigmore was looking forward to the time when there would be a four-year law course. Putting the legal clinic in the graduate or fourth year solves the problems of time and increases the research possibilities.

Vast areas of law will be left untouched by a legal clinic limited to legal aid and the defense of indigent criminal defendants. The untouched areas are likely to be central to the workings of our industrial society. It will leave, if not untouched, at least undone the difficult problems of law revision and codification about which Chief Justice Vanderbilt has written. A research center should make provision for such work. In many fields of law, such as antitrust or taxation, a research staff at a law school can be of aid to the private lawyer, and the utility of such a staff for law revision and codification has been shown by experience. The advantages will be reciprocal, for in all fields of law it is important that law schools have access to the facts and be able to ask questions about the facts. Many difficult problems in the economic-legal field might disappear, or at least would be seen differently, if the facts were better known. The legal clinic would take its place as one aspect of a research center.

Legal Clinic and Law Center Are Not Panaceas

The legal clinic and the law center are not panaceas for legal education. Nor is the proposal that the legal clinic be a graduate clinic made in criticism of existing work. Along with the whole of our society, the legal profession is undergoing a severe test. If we believe in knowledge and the results of knowledge, the law center should be of aid to the profession. In such a center, the legal clinic, building on the work that has been done, will find a natural place. As an organic part of the school, it will be available for training in practice. Along with legal aid bureaus, lawyer reference plans and public defender systems, it will render important aid to the community. And it will be an

indispensable part of that co-operative research among the Bar and with the other professions which law schools as intellectual centers for the law ought to provide.

Because the law is not an exact science we talk and act sometimes as though it were merely an art. We talk as though we did not believe in knowledge as distinguished from skill. But it is knowledge, integrity and perspective which distinguish lawyers from fixers. They make law valuable in society and essential to its continuity. Knowledge implies knowing the truth and truth is correspondence between our idea of a thing and the reality of the thing itself. Truth in the law is something more than a set of self-consistent principles (although that is important too). Truth in the law requires that the ideas of law coincide with the realities of the society which it governs. Thus research in the law must encompass both the ideas and the facts. So too with good law teaching, which has always been associated with good law research, and not, I think, by accident.

It is because law is important that legal research is important. And it is particularly because I believe the legal clinic can serve a valuable use in research that I am hopeful for its future.

Counsel for Big Business

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lawyer's job will be to obtain government approval through administrative proceedings. The lawyer is counsel for both the parent and the subsidiary and we assume that he cannot adequately contest the business judgment of the president. Can he reconcile these clandestine negotiations with his professional duty to the minority stockholders and directors of the subsidiary? The problem may be made more difficult by the lawyer's realization that, if the negotiations are temporarily blocked by the minority directors, the opportunity for making a sale of the assets and terminating the financial drain on the parent probably will be lost.

Experience seems to support the thesis that in this type of situation, as in the case of a director on the boards of two corporations which develop a conflict of interest, it is seldom to the best interest of either or both of the parties for the director or counsel to resign. The solution, of course, is to hammer out in one's conscience the extent of one's duty and in these situations it is rare that the lawyer can feel that he is discharging his duty, whatever its extent may be, by abdication.

Problems Arise When Two Corporations Have Same Law Firm

Where two corporate clients retain the same law firm, the immediate answer that comes to mind as a solution for the possible conflict of interest is to inform both clients of the conflict, after which the lawyer can proceed to discharge his function conscientiously if both parties agree to his continuing. The problem in the previous discussion is that the nature of the so-called client is such that it is impractical to put the question to him and, if the lawyers did put it to him, he probably could not get an answer. In this category of conflicting interests, however, the way is open to discuss the matter freely and frankly. After such a discussion, the answer should be fairly clear as to whether one can conscientiously represent both parties with their consent or whether independent counsel should be retained for one or the other.

One serious ethical problem involved, however, is that if the client is big business and has been paying substantial fees to the lawyer's firm for years, he is likely to experience a noticeable reluctance in sending the client to some other lawyer. Intangible and unconscious pressures will weigh to rationalize the conflict and help him decide either that the conflict doesn't exist or is unimportant. This is the first danger spot. The lawyer must resolve all doubts in favor of full disclosure if there is a chance of conflict.

The second danger point raises a practical problem and comes after disclosure to the two clients and their reactions that they would prefer to have the lawyer's office continue to act for both. I knew of a case some years ago in which two large corporations, who were clients of the same firm and had had no conflict for many years, suddenly had opposing interests because of an unexpected Supreme Court decision declaring a statute unconstitutional. Neither client wanted the matter handled by an outside office and it was agreed that lawyers *A*, *B* and *C*, in the firm would represent one corporation on this matter and lawyers *D*, *E* and *F* would represent the other. Both clients had complete confidence in the individual lawyers involved, with whom they had worked for years, and no problem ever seemed to arise about the matter. It was disposed of in a short time, however, and I feel certain that the senior partner of that firm would not have allowed the arrangement to continue for any protracted period. Nevertheless, it appears that devices of this kind, but on a smaller and more subtle scale, are frequently resorted to when conflicts appear.

In another case two large corporations which had been clients of the same law firm for many years decided without consulting counsel that they would enter into an arrangement whereby one would purchase most of the annual output of the other. The commercial men worked out quite detailed arrangements for a long-term contract. Representatives of the two corporations then appeared for the first time at the firm, went to the office of one of the senior partners, described what they wanted to do and asked him personally to draw up the contract so as to express and effectuate the arrangement which they felt they had already agreed upon in substance and in considerable detail. I think almost any lawyer would say that there is no reason in profes-

sional ethics why the lawyer should not have undertaken to do this job. He did do the job and brought to bear his great legal skill in preparing a contract which would be completely fair to both parties. He felt that he was acting as a sort of impartial referee. The two companies operated under the contract very amicably for some years but the ending of the story is a sad one. Severe changes in economic conditions occurred, making the contract onerous to one of the parties, and controversy arose. Recriminations were heaped upon the head of the hapless lawyer and finally one of the clients departed from the firm.

This is but an illustration of the fact that when big business clients are involved with huge sums of money at stake, it is much more dangerous for a lawyer to undertake to represent conflicting interests. The type of representation which is entirely harmless where the clients are individuals or small concerns can have a very low kindling point where large industrial organizations are involved. It may be that the law firms representing big corporations house more conflict between clients than the lawyers are willing to admit. The unconscious compulsions which inevitably exist tend to dull the lawyer's perception of conflicting interests which should be represented by separate counsel.

Lawyer Becomes Involved in Policy-Making

In representing big business the lawyer, to a greater extent than in the case of small business and individuals, necessarily becomes involved in policy-making and planning for the future. This is especially true if he is house counsel or a director. In big business the practice is much more prevalent of consulting the lawyer before rather than after the act, particularly in well-managed corporations which make enlightened use of their lawyers. In such corporations the manager demands the protection of a lawyer's blessing before he embarks on a new program. He finds that his programs must be continuously re-examined and readjusted as decisions, regulations and statutes change. He seeks to pin the responsibility squarely upon his counsel for the legal propriety of the deal or program, and counsel must take the responsibility. In the process the lawyer becomes deeply involved in, and closely identified with, the policy and the program.

Suppose that the lawyer, as general counsel, has advised in favor of, and even promoted, a certain international trade program. Heavy losses have been incurred largely because of unforeseen currency restrictions. The lawyer must handle the tax aspects of the transactions in such a way as to save as much of the loss as possible. The neatest way to do this may involve the admission that the venture was ill-advised or even illegal *ab initio*. It would seem doubtful whether in such a case the lawyer is in a position of sufficient detachment to discharge his function properly. The use of outside counsel on the tax controversy who had nothing to do with the original venture would not provide a completely satisfactory solution, since general counsel would have to take responsibility for accepting or rejecting the line of action proposed by independent counsel.

There are some lawyers who go further and insist that the attorney should not sit on the board of directors of his corporation client. The theory is that he cannot have the detachment from the affairs of the client that is necessary for rendering independent legal advice. That is certainly a minority view. It is clear that as a practical matter, house counsel must refer matters to outside firms for more detached points of view. The point is, however, that the interest of the client cannot be best served by many different sets of lawyers having detached points of view.

Parties With Conflicting Interests Tend To Rely on Big Business Counsel

The specialization in law practice which develops from the needs of large corporate clients results in the development of a great skill on the part of some lawyers in particular fields. They attain reputations in these fields. They are known as men of high moral and professional standards. The result is that sometimes, in spite of anything they say or do, parties having contrary interests tend to rely upon them.

In the field of financing, for example, the expertness may take an

acute form. In the preparation of a registration statement for the issuance of securities, full disclosure is required of the condition of the corporation which will be issuing the securities. Typically the counsel for the underwriter will be a lawyer who has spent many hours wrangling with the SEC over the exact meaning and hidden connotations of the term "full disclosure", whereas counsel for the issuer typically is unfamiliar with the fine points and ramifications of securities practice. Of course, the interest of the issuer and the underwriter coincide on a great many points. They both want the underwriting to be successful. They want the company to succeed, and they want the entire matter handled so that there will be no scandal or upsetting problems in the future. As to disclosure, however, there can be a conflict. It is to the underwriter's interest to make the fullest possible disclosure of the facts, no matter how foreboding or gloomy they might be. The underwriter obtains his fee per share even if the securities have to be marketed at a cut price and fail to realize the revenue hoped for by the issuer. The issuer, on the other hand, has the interest of going no further than compliance with the full disclosure requirement. He does not want to elaborate upon the possibilities of disaster.

Despite this clear conflict of interest, it seems that frequently the issuer and his attorney will rely upon the underwriter's counsel as to the scope of the disclosure. The result can be, and sometimes is, a registration statement that is definitely unfair to the issuer. The underwriter's counsel, in their zeal to comply with the disclosure requirements, write extended paragraphs pointing out the possibilities of all kinds of dire consequences and developments. After reading some of these statements one wonders why anybody would think of buying a share of the stock at all.

Thus the lawyer for the underwriter is sometimes in an uncomfortable position. It is a situation difficult to correct by anything he might say. If he points out at the beginning of the negotiation that the underwriter's interest is adverse to the interests of the issuer and that the issuer should place no reliance upon him, he casts himself in the role of a vain fellow who thinks so highly of his own ability that he supposes the opposite party is going to rely upon his skill. If, however, he waits until he actually begins to feel that the opposite party is relying upon him, his efforts then to serve notice on the opposite party may create such a feeling of suspicion at a critical point in the negotiations as to threaten to jeopardize the whole deal. Furthermore, the admonition may be entirely disregarded by the opposite party.

This problem of reliance by the opposite party is not so severe in the case of counsel for big business as it probably is in the case of counsel for the Government. The citizen who sits across the desk from the government counsel sometimes has a feeling, perhaps unconscious, and certainly naïve in the extreme, that government counsel represents the people at large including the individual citizen and that reliance can be placed upon what he says. Actually, the governmental program which the particular government counsel may be under the duty to promote involves the elimination of the citizen's business or other consequences quite adverse to his interest. In the case of government counsel, of course, the reliance is not so much on the expertness of the opposite counsel as it is upon his imagined representative capacity.

Power of Money Gives Rise to Ethical Problem for Counsel

A distinguishing feature of the practice of counsel for big business is the amount of money and manpower at his disposal in carrying on the fight to attain any particular objective. This difference becomes especially apparent in litigation and administrative proceedings. This power can give rise to a number of ethical problems.

In a typical proceeding before an agency of the Federal Government, a large corporation is approached at the outset by people who want to assist in various ways. They will be public relations counselors and specialized practitioners, often former government officials, who think they can be useful because of their connections in the Government. Normally, the client wants to leave to his counsel the question whether these specialists should be retained, but sometimes he has definite feelings in favor of making arrangements with such people. The client may put counsel on the spot by saying that money is no object and that he is free to hire as many such people as he wishes.

This is a very distasteful situation for any lawyer. If he hires these men, he may have squandered the client's money; if he fails to hire them, he will be criticized for having failed to use resources which were available to him. Actually these peddlers of influence are not true lawyers. Counsel should not be put in a position of having to hire them. Indeed, if counsel is forced to engage their services, these independent specialists may indulge in activity which will jeopardize his case. I have never seen nor heard of an instance where there was any convincing reason to believe that the peddlers of influence affected the outcome of a case. The answer to the problem is that counsel should stand firm and handle the matter in a dignified way on its merits and not be worried about later criticism.

A related problem arises where the client urges the use of the full panoply of legal technicalities to delay or defeat a decision. If the opposing party has small financial reserves, the client may be most insistent that expensive motions, examinations and appeals be employed. Traditionally, lawyers have felt entitled to take advantage of every opportunity provided by the rules to win a case. When it is done, however, in such a way that advantage is taken of a wide disparity in financial resources, real in-

justice can result. I realize this has occurred from the beginning of our legal system and continually occurs because of the plain lack of funds on the part of one of the parties to carry on the fight. No satisfactory answer has ever been found for that situation. But counsel for big business must be especially alert to avoid becoming a party to needless oppression caused by the power of money.

It has been my observation that as lawyers mature and become more confident of themselves, they are more inclined to handle any litigated matter in a way calculated to bring about a just result. They develop the courage to stand up against the oppressive use of expensive legal maneuvers. It is the neophyte who "motions and appeals the opposite party to death".

Counsel Should Insist on Accurate Files

Although there is no ethical problem involved in the subject of the misuse of a corporation's files, any treatment of the topic would be incomplete without mentioning it. The difference between big business and little business with respect to files is, of course, that big business must keep good files in order to do business at all, whereas the small businessman can get by without good files, or indeed, at times, without any files.

One of the greatest services performed by house counsel is the ceaseless process of training the management to keep accurate files. When an erroneous memorandum crosses counsel's desk, his practice should be to correct that memorandum by a supplementary or substitute one. He should not attempt to handle the matter by destroying or secreting the document. Any good house counsel follows this rule.

There is, of course, no duty on the part of corporations to keep their files forever and it is only prudent to have some systematic method of keeping the files within a reasonable compass. There are certain industries under regulation, such as public utilities, which have statutory duties concerning the length of time and manner in which they keep their files. In such cases, of course, the requirements must be complied with meticulously.

The problem of accurate files may arise in a number of ways. For instance, Company *A* may have a very successful product made by means of a secret chemical formula. Company *B* may have a competing product which is inferior. In its efforts to improve its product, it hires an independent chemist who has worked for a period of time in the laboratories of Company *A*. Actually he has no knowledge of the secret formula of Company *A* but he is an expert in the field. He works for months devising various formulas and finally comes up with an idea which appears to produce a product practically as good as Company *A*'s superior product. The new product is put on the market. A suit is brought by Company *A* for the theft of its secret formula. Jones, the young lawyer who works in the office which is defending Company *B*, finds when he studies the records of Company *B*, that an assistant treasurer has made an entry in the books for the payment of the fee of the independent consulting chemist which states, in effect, that the payment was for the "Company *A* secret formula". Here is a case where an uninformed company official has made a completely erroneous entry. When the other officials discover it, their immediate reaction is to destroy that record and substitute a correct record. Jones thinks that he should check with the partner handling the case. Jones does, and the partner replies, "Jones, I am ashamed of you for even considering such a thing. Of course, the entry must remain undisturbed." In the actual case, the ending was sad. Company *B* lost the case and suffered a very sweeping judgment; both client and lawyers ascribed the loss to the erroneous entry.

I do not cite this case as an example of an ethical problem. The partner's answer to Jones is the only possible one. It was unfortunate that house counsel had not discovered the erroneous entry and corrected it at the time it was made. For my part, the partner's position does not depend upon whether a subpoena *duces tecum* has been served or whether litigation has only begun. In either situation, once process has been served no tampering with records can be allowed.

A few years ago, in the midst of a trial, certain documents of the corporation client of Jones' law office were subpoenaed. Jones and another young lawyer just out of law school went to the client's office in the evening and inspected the books. As they turned the pages, they uttered small whistling and hissing sounds indicating their consternation at what they read on certain pages. Jones noticed that some minor official of the client was busy taking notes of the page numbers. When the reading of the book was finished, Jones referred to the note taking and said that these documents were under subpoena, must not be tam-

pered with, and must be produced in court the next morning untouched. As Jones was putting on his hat and overcoat in the next room preparing to leave, he heard sounds of pages being ripped from a book!

Jones was tired and it was late and he did not positively know that the pages were being torn out of the subpoenaed book in violation of his instructions. This was a comparatively minor aspect of the case and his senior was deeply occupied with more important problems. Jones decided to sleep over it. The next morning, as he sat in court, he suffered. He still felt that he should not worry his senior. At length he made up his own mind that when the book was produced by the client, he would rise and take a look at it and, if it was not the same as he had seen the night before, he would state then and there that such was the case. It happened that opposing counsel actually never asked for the book to be produced and Jones does not know to this day whether it was tampered with.

Normally, it is relatively easy to handle the client by appealing to his practical sense as well as to any moral values he may have in defending your refusal to permit any tampering with files. As any corporation executive knows, there are many copies of corporate documents, some of them turning up in strange places, and there are cross-references in later documents, so that tampering with files is a foolhardy thing to do.

Counsel Is Keeper of Client's Conscience

Counsel for big business has a part to play far above and beyond the maintenance of the contemporary ethics of the legal profession. He is the keeper of the client's conscience.

There is little doubt that the manager of big business in America today is a much more high-minded and ethical citizen than he was twenty or twenty-five years ago. This has resulted in part from the depression and, in part, from the experience in World War II. Notably in World War II big business managers were called to Washington and given responsibilities of enormous import in the public interest. There is nothing so effective in creating a sense of public responsibility as being required to assume such responsibility. The big business executive wants to do the "right thing" and live by a standard higher than that of the market place. It is the lawyer's special job to help him attain that goal.

The head of a large corporation bears a tremendous responsibility and is subject to powerful pressures. He wants not only to show a profit but to build an institution which will be sound for the long term and which will be a monument to his leadership. In our highly competitive American system, the struggle to attain these goals is apt to dim his ethical sensibilities. He is under intense pressure from his commercial department heads to gain the desired commercial ends and to let nothing stand in the way of their attainment. It is the lawyer's task to strengthen the client against these pressures.

The lawyer must conduct himself in such fashion that the client will feel in him the strength and solace of moral rectitude. If the lawyer allows the commercial pressures of the day to lead him into compromise with the ethical role that is his to maintain, he will in all probability lose not only the priceless consciousness of abiding by the ethical standards of his chosen profession, but in the process he will lose the respect of his client. Once that respect is lost, it will be only a matter of time until the client is lost.

Economic Inventory of the Legal Profession

(Continued from page 199)

Is that really true, that law does not change?

Law Has Changed More Than Medicine

A lawyer who has practiced in a big city firm, and taught law, and written law books, stated recently to a group of Ohio lawyers that there are more new things in law than in medicine, even with all the new drugs. Have you heard of the income tax law, the estate tax law and the gift tax law? There is a lot of practice in those fields, if lawyers were only competent. It is not unusual to hear a lawyer say that he does not know anything about tax law, and does not want to learn. Such lawyers are shutting their doors to clients who want help.

Have you heard of the marital deduction for estate and gift taxes? Are you really competent in that field? Clients need lawyers who can give them the benefit of those laws and guard them from the pitfalls.

Are you thoroughly at home with the wage and hour law, and with wage and salary stabilization? Are you really competent in labor relations matters?

Do you know precisely the point at which the Securities and Exchange Commission will take an interest in the solicitations for subscriptions to stock of your client's corporation?

Those are only a few of a long list.

Many lawyers complain that the accountants, and the bankers and others, are practicing law; that they are advising people about tax law, and drawing wills, and administering estates, and the like. They say that this is lawyers' work, and the organized Bar should stop these people.

But have these complaining lawyers asked, why is this work taken to accountants, and to bankers, and to others? Why have people learned to go outside the legal profession for such highly technical legal skills?

Thirty years ago there were very few accountants, and very few trust departments in banks. Lawyers did the simple things that were sufficient in those days.

Lawyers Did Not Keep Up with Changing Laws

But the laws changed—note that, the *laws* changed, and we lawyers did

not keep up with the changing laws. The lawyers failed to become competent on the new laws and the new procedures, and when people asked about these highly technical matters under the new laws, the lawyers said they did not understand these new laws, and to see the accountant, or the banker. Or if lawyers tried to do the job, people soon realized that most of them were just blundering around.

And so, in effect, we lawyers opened the door to our private preserves and invited the accountant and the banker and others to take over. And now we are complaining because they accepted the invitation.

It is not to be expected that many lawyers will admit the truth of these statements. But each reader should ask himself, how many lawyers in his town were really competent on income tax law in the nineteen twenties and thirties when that law was developing? Or are really competent now?

And how many lawyers in your town are, even now, really competent to handle an estate from start to finish, with all the complications of income and estate taxes and returns? How many can really do a better estate job than the accountant or the banker? If lawyers cannot do a better job, they cannot expect people to bring the work to them.

Surely, it is not necessary to labor the point that today everything is more complicated than it was twenty or thirty or forty years ago. Look at all the marvels of science, industry and business. Everything moves faster and the country is full of highly trained people in all these new skills and techniques. Everyone, that is, but the lawyers. We expect to satisfy 1952 clients, and solve their 1952 problems, with our 1920 skills.

Well, there is another possible reason why lawyer's incomes have fallen behind—too many lawyers are not qualified to do the work that people need.

How about the third question—*what can we do about it?*

Problem Can Be Solved, Just as the Doctors Solved Theirs

We can solve these problems, just as the doctors have. They saw the light years ago, about 1910, and took the necessary action. We did not and look at the results. During the last twenty years, their incomes have kept pace with the economic growth of the country, and increased 125 per cent, while ours have only increased 46 per cent, less than the increase in the cost of living.

Among other material on this subject of doctors' and lawyers' incomes, is a study by economists in the office of the American Medical Association.[8] That Association has doctors of philosophy on its staff to study problems such as these and to point out to the medical profession how it can improve. These economists tried to find the reasons for the increase in doctors' incomes. Their conclusions boil down to this, that *the doctors increased their incomes by becoming more proficient doctors.* This has resulted in a terrific increase in the demand for the services of physicians.

Here again, I do not pretend to have the final answers. I do offer two suggestions, two things that we lawyers can do:

First, we can do something about our law schools. We can find a way to train our young men so that they are really competent to practice law when they are admitted to practice. This is a job for the profession as a whole, not for the law teachers alone. The revolution in the medical schools was forced on those schools by the medical profession. This is a job for the practicing lawyers, a job for the organized Bar.

It is a fraud on the public to hold a young man out as a qualified and competent lawyer when we know he is not qualified and not competent—and we do hold him out to the public as competent and qualified, when we admit him to practice.[9]

Second, we can have a comprehensive continuing legal education program. Not merely a few hours once a year, but a year-round program that will make better lawyers of all of us.

We shall have to attack both these educational problems with the same skill, ingenuity and determination with which we solve the problems of our clients. We must face the need to increase the efficiency of the legal profession, to make all of us better lawyers, and to insure that our successors will be equipped to meet the demands of the future.

Our clients need more and more competent services. Our families need increased incomes. The future of the profession requires better lawyers and increased lawyers' incomes.

The challenge is—*what are you going to do about it?*

8. "Survey of Physicians' Incomes", by Dickinson and Bradley, *supra*, note 5.

9. In any meeting of lawyers, there are heard humorous references by older lawyers to the times they were kicked out of court while learning how to try a case. That trial-and-error system does eventually produce good trial lawyers, but what about the clients whose interests are inefficiently protected while embryo lawyers are learning? Can the profession now afford to ignore that public relations problem?

Charles Evans Hughes

(Continued from page 204)

Supreme Court", "Organizing the Court for Efficiency", "Marching Constitution", "Balance Wheel of Power", "Guardian of Freedom", "The New Deal in Court", "The Court-Packing Fight", "Triumph of Restraint" and "Culmination". Each of these is a discriminating discussion of an indicated portion of the work of the Court during the eleven years of the Hughes regime. Perhaps the most illuminating comments on Hughes' work "Inside the Court" are those supplied to Mr. Pusey by Mr. Justice Roberts between whom and the Chief a warm friendship developed. It is understood that Mr. Pusey is not a member of the Bar. He writes, however, with lawyer-like precision and shows an adequate appreciation of the legal problems which he discusses—many of them delicate questions of constitutional law. Thus he analyzes with acuteness the so-called "hot oil" cases, the Gold Clause cases, the N.R.A. decision and the A.A.A. case. In the last mentioned case, which this reviewer argued for the taxpayers, there is a slight inaccuracy in Mr. Pusey's statement that it was a suit by the taxpayers to prevent collection of the tax. Had this been the case, a serious procedural question would have arisen of which the Government would have been quick to take advantage. In point of fact (and perhaps in a moment of forgetfulness) the Government itself had gone into court to compel the receivers of the Hoosac Mills to pay the tax and their answer had put the validity of the tax directly in issue.

Hughes Contributes to Defeat of "Court-Packing" Plan

Mr. Pusey's account of Franklin Roosevelt's audacious attempt to pack the Court is altogether admirable. Proper emphasis is placed on the contribution made by the Chief Justice to the ultimate failure of that attempt. This contribution took the form of a letter to Senator Wheeler setting forth in noncontroversial but convincing fashion the simple facts respecting the work and procedure of the Court and the complications that would result if the number of Justices were increased beyond nine. Mr. Pusey undertakes to refute the charge that some of the decisions of the Court resulted from the pressure applied by President Roosevelt. It is probably impossible to determine this question with accuracy. It must, however, be evident that the Justices were working "under the lash" and that they were naturally reluctant to supply hostile critics with more ammunition.

With these and other great matters to engross him, the eleven years spent on the Court by Hughes passed quickly. At the expiration of that time, as the incidental strain had begun to tell upon him, he made up his mind to retire. This he did on July 1, 1941, and from all over the country came expressions of regret at his going. His day-to-day life after retirement, his never-failing devotion to Mrs. Hughes and the happiness derived from association with his grandchildren are touchingly described in Mr. Pusey's closing chapter. The death of Mrs. Hughes on December 6, 1945, left her husband little to live for. He was surfeited with honors and had fully discharged his duty to the Republic. When the end came on August 27, 1948, he had lived to be 86 and was fully prepared for the great adventure.

It has been the privilege of this reviewer to appear before the Supreme Court during the terms of no less than six Chief Justices—Fuller, White, Taft, Hughes, Stone and Vinson—and this throughout a period of nearly sixty years. All these men have presided with dignity and, when under provocation, with patience. They have differed in intellectual grasp, in legal equipment and in their capacity to promote judicial team-work. But most competent critics would agree with the judgment of Mr. Justice Brandeis who declared that Hughes was the best Chief Justice he had ever known.

Corporate Support to Education

(Continued from page 212)

praisal statutes come to mind as examples. The accrued dividends of preferred stockholders, the current object of most concern in this area, can be adequately protected by astute courts and legislatures without resort to the restricted view of the scope of the reserved power.

Courts are sometimes reluctant to jettison even the most obviously impeding and useless doctrinal baggage. It is necessary, therefore, to examine the true effect of the Zabriskie doctrine on the problem at hand. Two lines of thought lead to the conclusion that the corporate charitable donations statutes do not come within its purview even where it holds sway: (1) The doctrine applies only to fundamental changes, and (2) it gives way to the public interest. Both of these propositions are well imbedded in New Jersey case law.

The Zabriskie doctrine applies only to fundamental, as opposed to incidental, changes in corporate charters, because even without a reserved power clause, majority stockholders can make incidental changes over a minority objection.[16] It is easily arguable that a statute expressly authorizing corporate donations is simply a declaration of what the modern common law should be. The power to make charitable contributions for business purposes existed before the statute. At most, the statute redefines the scope of its exercise. It does not change the business purpose of the corporation, nor materially increase the risks of investment, nor prefer one group of stockholders over another—all of which have at various times been regarded as matters of fundamental importance. Rather, the statute seems simply to recognize that charitable donations fit into the pattern of accepted devices

16. *Grausman v. Porto Rican-American Tobacco Co.*, 95 N.J. Eq. 155, 121 Atl. 895, *aff'd.*, 95 N.J. Eq. 223, 122 Atl. 815 (1923); 18 C.J.S., Corporations, §496.

for furthering the long-range profit-making business purpose of the corporation. Directors are not relieved from their fiduciary obligations in exercising this, or any other, corporate power. If a change has been made in the authority of directors, the change by any reasonable test is incidental and not fundamental.

The New Jersey cases also suggest that the Zabriskie doctrine is subordinate to the public interest. Judge Swayze, in *Murray* v. *Beattie Mfg. Co.*, [17] seems to have been the first to state the matter clearly. The case involved an attempt by a corporation to take advantage of a subsequent statute, enacted under the reserved power, authorizing charter amendments making dividends discretionary with the board of directors; the statute previously had made them mandatory after a reserve had been set aside for working capital. The court upheld the amendment on the ground that all stockholders had assented, but Judge Swayze went on to say that the state could have granted the majority this power without unanimous assent because of the public interest in dividends and accumulations.[18] This principle has since been applied to sustain a merger by a bank and a trust company on two-thirds approval and a petition for dissolution in deadlock approved by holders of one-half the shares, both pursuant to statutes enacted under the reserved power subsequent to incorporation.[19]

It is possible to go further. It might be forcefully argued that the preservation of privately financed charity is of such vital importance to the public welfare that it comes within the overriding police power of the state. Aside from the fundamental policy questions involved in the preservation of private enterprise, there is the very practical problem resulting from the fact that the states have lost much of their effective taxing power to the federal government, so that it is increasingly difficult to maintain local charities out of state funds. In this setting, it is reasonable for the state to encourage corporate associations of citizens, within the framework of voluntary action, to support privately financed charity. This line of thought seems to have been in the mind of the New Jersey legislature in 1950.[20] But whether the corporate donation statute falls technically within the police power, or simply within the "public interest" exception to the Zabriskie doctrine, does not seem to make much difference in the final result.

If this analysis of the status of the corporate donations statutes is sound, we may look forward to the complete success of the program undertaken three years ago by the Committee on Corporate Laws, and, at the same time, to the removal of the last legal obstacle to the realization of the program set forth by Mr. Olds.

17. 79 N.J. Eq. 604, 82 Atl. 1038 (1912).

18. "We must not be understood, however, as deciding that the Legislature was without power to make the change . . . even if the stockholders did not assent. The provision limiting the amount to be reserved as working capital had a twofold aspect. It had the effect of securing dividends to the stockholders where the corporation was successful, and of limiting the power of the corporation to increase its assets largely beyond the capital authorized by its original certificate. This was a matter of state concern . . . and it is also a matter of state concern that a corporation should be permitted to accumulate a sufficient fund to secure its credit and make permanent its successful operation." (79 N.J. Eq. at 609, 82 Atl. at 1040).

19. *Bingham* v. *Savings Investment & Trust Co.*, 101 N.J. Eq. 413, 138 Atl. 659, *aff'd.*, 102 N.J. Eq. 302, 140 Atl. 321 (1928) (in which the court stated that the Zabriskie doctrine "is, of course, to be applied subject to the police power of the state" and that "The form of the exercise of the reserve power is immaterial. It may be by mandate, or be authorized upon acceptance by the directors or stockholders or both."); *Petition of Collins-Doan Co.*, 3 N.J. 382, 70 A. (2d) 159 (1949).

20. "The Legislature declares that it shall be the public policy of this State that encouragement shall be given to the creation and maintenance of institutions . . . engaged in [charitable, etc.] activities . . . , that such a policy will be in the public interest in that the public welfare will be thereby promoted; and to the end that the public policy herein declared may be supported and furthered, corporations . . . should be specifically empowered [to support these institutions]. . . ." (Laws 1950, c. 220).

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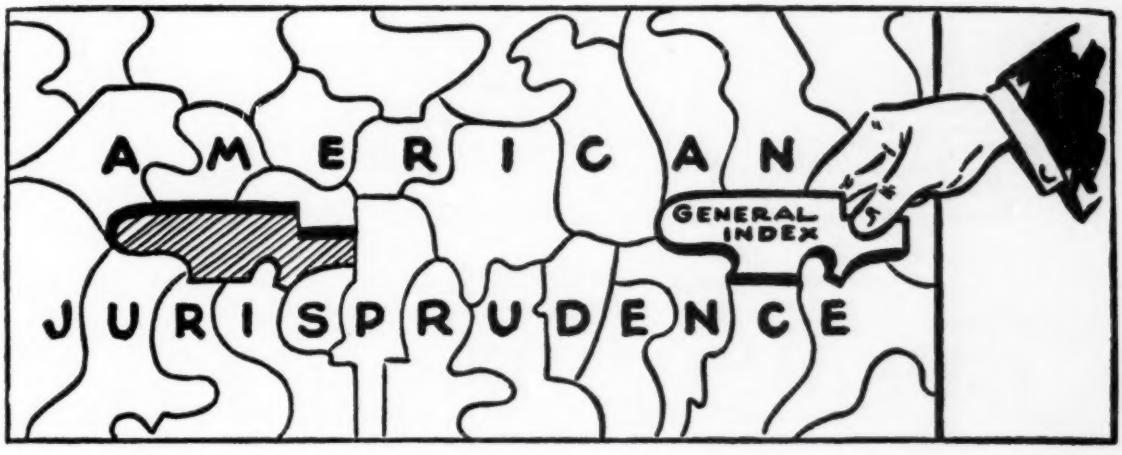

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